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# TRANSCRIPT OF RECORD.

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## SUPREME COURT OF THE UNITED STATES

No. 529.

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THE UNITED STATES, APPELLANTS,

vs.

EDWARD A. YORKE.

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APPEAL FROM THE COURT OF CLAIMS.

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**FILED OCTOBER 14. 1876.**

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### INDEX.

| | Original. | Print. |
|---|---|---|
| Petition | 1 | 1 |
| Traverse | 3 | 2 |
| Set-off and counter-claim | 4 | 2 |
| Final judgment | 6 | 3 |
| Application for allowance of appeal | 7 | 3 |
| Order allowing same | 7 | 3 |
| Findings of fact and conclusions of law | 8 | 3 |
| Certificate | 17 | 5 |

1 *Petition.—Filed June* 12, 1871.— J. R.

U. S. Court of Claims, December term, 1871.

EDWARD A. YORKE *vs.* THE UNITED STATES. } No. 6348.

To the honorable the Court of Claims:

The petition of Edward A. Yorke, a citizen of the United States, respectfully shows:

That in the year 1865, he had commercial interests in the city of New Orleans, and there engaged in a transaction in cotton under the circumstances hereinafter explained:

Petitioner avers that by the 8th section of an act of Congress of July 2d, 1864, it was enacted that it should be lawful for the Secretary of the Treasury, with the approval of the President, to authorize agents to purchase for the United States any produce of States declared in insurrection, at such places as should be designated therein, and at such prices as should be agreed on with the seller, not exceeding the market value thereof at the place of delivery, nor exceeding three-fourths of the market-value thereof in the city of New York at the latest quotations known to the agent purchasing, and under the authority of this act, and in accordance therewith, the Secretary of the Treasury, on the 24th day of September, 1864, with the approval of the President, of the same date, issued general regulations for the purchase of products of the insurrectionary States on government account, and, on the 9th of May, 1865, certain amended regulations relating to the same object.

Your petitioner shows that, in pursuance of said regulations, the petitioner sold to the United States, and repurchased through O. N. Cutler, the purchasing-agent of the United States, on June 15, 1865, ten bales of cotton, the whole price whereof was the sum of $1,408.96, and he paid to the government one-fourth thereof, to wit, $352.24, and on June 23 fifteen of bales, of which he abandoned four to the government.

Your petitioner shows that the aforesaid payment of $350.24 and abandonment of four bales of cotton was illegally exacted of him and made by him in error, because, before said payment was made, to wit, on the 13th of June, 1865, the President of the United States had annulled and removed all restrictions on trade east of the Mississippi
2 River, as by law he had a right to do, and that thereby the 8th section of the act of July 2d, 1864, became inoperative and was repealed as regards the city of New Orleans, which lies east of the Mississippi River.

Your petitioner further represents that he is advised and believes that the said O. N. Cutler, the aforesaid purchasing-agent of the United States, regularly rendered his accounts to the Treasury Department, and that the said sum of three hundred and fifty-two dollars and 24 cents and the proceeds of said four bales of cotton, which were sold by the government agent, were received by the Treasury of the United States.

And whereas, from the premises it appears that the Treasury of the United States has thus erroneously and illegally received the said sum of money and cotton, an implied obligation arises on the part of the United States to refund to petitioner said sum of $352.24 and the proceeds of said four bales of cotton:

Wherefore your petitioner submits and prays that a decree may be rendered, declaring that he is entitled to the reimbursement of said sum of three hundred and fifty-two dollars and 24 cents and of the proceeds of the aforesaid four bales of cotton.

Your petitioner further avers that he has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the said government.

LOUIS JANIN & SONS,
HUGHES, DENVER & PECK,
*Solicitors for Claimant, Washington, D. C.*

Address of claimant:

Edward A. Yorke, being duly sworn, deposes that he has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the said government; that no assignment or transfer of the claim set forth in the foregoing petition, or any part thereof, or any interest therein, has been made, except as in the said petition stated; that the affiant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that he believes the facts as stated in said petition are true.

EDW. A. YORKE.

Sworn to and subscribed before me this 18th day of March, 1869.

[SEAL. D. AUGUSTIN,
*U. S. Commissioner for the Dist. of La.*

3 In the Court of Claims of the United States, December term, A. D. 1870.

EDWARD A YORKE
*vs.* } No. 6348.
THE UNITED STATES.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein; and, not confessing the same or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And, as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of three hundred and fifty-two dollars and twenty-four cents and the proceeds of four bales of cotton, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, denies the said allegation.

THOMAS H. TALBOT,
*Assistant Attorney General.*

Filed August 11, 1871.

4 In the Court of Claims.

EDWARD A. YORKE
*vs.* } No. 6348.
THE UNITED STATES.

*Set-off and counter-claim.*

The said defendants, by Thomas Simons, Assistant Attorney-General, come and say that the said plaintiff, before and since the commencement of this suit, was and still is indebted to the said defendants in a large sum of money, to wit, $208.26, the same being for internal-revenue tax upon the 25 bales of cotton brought by him into New Orleans:

Wherefore the Assistant Attorney-General prays that judgment be entered against claimant for said sum of $208.26.

5 **THOMAS SIMONS,**
*Assistant Attorney-General.*

Filed May 17, 1876.

6 In the Court of Claims.

EDWARD A. YORKE
*vs.*
THE UNITED STATES. } 6348.

At a Court of Claims, held at the Capitol, in the city of Washington, the first day of June, A. D. 1876, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Edward A. Yorke, claimant, do have and recover of and from the United States the sum of seven hundred and twenty-five dollars ($725).

By the court.

A true copy of record.

7 In the Court of Claims of the United States, Dec. term, 1875.

EDWARD A. YORKE
*vs.*
THE UNITED STATES. } No. 6348.

From the judgment rendered in the above-entitled cause on the first day of June, 1876, in favor of claimant, the defendants, by their Attorney-General, on the 26 day of August, 1876, make application for, and give notice of, an appeal to the Supreme Court of the United States.

**THOMAS SIMONS,**
*Ass't Attorney-General.*

Filed August 26, 1876.

AT CHAMBERS.

Allowed.

C. D. DRAKE, *C. J.*

8 Court of Claims.

EDWARD A. YORKE
*vs.*
THE UNITED STATES. } No. 6348.

*Findings of facts.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. On the 12th of June, 1865, there arrived at New Orleans, on the steamer Grey Eagle, from Vicksburg, ten bales of cotton belonging to Edward A. Yorke. At that time no shipments of cotton to New Orleans were allowed except such as were consigned to the purchasing-agent of the Treasury. On June 13th, 1865, Yorke executed a bill of
9 sale of all the cotton to the purchasing-agent, at an expressed consideration of one thousand and fifty-six dollars and seventy-

two cents, the receipt of which he acknowledged, and on the same day the purchasing-agent executed to him (Yorke) another bill of sale of all the cotton at an expressed consideration of one thousand four hundred and eight dollars and ninety-six cents. Yorke thereupon paid to the Treasury agent the difference, viz. three hundred and fifty-two dollars and twenty-four cents, and received the cotton; such interchanged bills of sale and payment being in fact one transaction, intended to be in compliance
with the provisions of the act 2d July, 1864, § 8 (13 Stats. L., 375),
10 and the Treasury rgulations thereunder of 9th May, 1865, relating
to the "purchase of products of the insurrectionary States for government account." The Treasury agent also reported the said amount as being "25 per cent. retained on government account," and it duly accounted for by him and paid into the Treasury.

When the sale and resale took place neither Yorke nor the Treasury agent had knowledge of the President's proclamation 13th June, 1865, annulling restrictions upon trade east of the Mississippi. The said ten bales were returned to Yorke free from all fees and internal-revenue
taxes, said taxes amounting to $88.60.

11 II. On June 24th, 1875, there also arrived at New Orleans, on
the steamer Any One, from a point west of the Mississippi, fifteen bales of cotton also belonging to Yorke. At that time no shipments of cotton to New Orleans from the west of the Mississippi were allowed, except such as were consigned to the purchasing-agent of the Treasury.

On the 26th of June, 1865, Yorke executed a bill of sale to the Treasury agent (without any expressed consideration) for the whole of the fifteen bales, and on the same day the Treasury agent executed to Yorke another bill of sale (also without any expressed consideration) of
eleven bales thereof. Yorke thereupon received the eleven bales
12 and the Treasury agent retained the four bales, such interchanged
bills of sale likewise being in fact but one transaction, intended to be in compliance with the act 2d July, 1864, § 8, and the Treasury regulations thereunder of May 9, 1865. The four bales were subsequently shipped to S. Draper, United States cotton-agent at New York, and sold by him at a net average of one hundred and thirty-seven dollars and seventy-four cents per bale, producing in all five hundred and fifty dollars and ninety six cents, net. The said eleven bales were returned to Yorke free from all fees and internal-revenue taxes. Said
internal-revenue tax on said lot of fifteen bales amounted to
13 $120.00. At the date of the said transaction as to the fifteen
bales neither Yorke nor the purchasing-agent had knowledge of the Presidential proclamation of June 24, 1865.

Court of Claims.

EDWARD A. YORKE *vs.* THE UNITED STATES. } No. 6548.

*Request of claimant for further findings of facts.*

I. The internal-revenue tax of 2 cents per pound on the first lot of ten bales (all of which lot was returned to claimant, the bonus being
paid in money,) amounted to eighty-eight dollars and six cents.
14 Upon the foregoing request, the court makes the following
order, to wit:

Allowed.

II. The internal-revenue tax of 2 cents per pound on the eleven bales returned to claimant, out of the 15 bales constituting the second lot of cotton, amounted to ninety dollars and fourteen cents.

E. & A. C. JANIN,
*Attorneys for Claimant.*

Upon the foregoing request, the court makes the following order, to wit:

Allowed.

And upon the foregoing findings of fact, the Court of Claims decided as—

### *Conclusions of law.*

15 I. The claimant is entitled to recover the sum of $352.24 exacted from him by the Treasury agent at New Orleans, as a fee or bonus for the cotton delivered up to the claimant on the 13 June, 1865, and also the avails of four bales of cotton exacted and withheld from him by the said Treasury agent on the 26 June, 1865, amounting to 550.96.

The defendants are entitled to recover the internal revenue tax of two cents per pound on the ten bales of cotton returned to him by the Treasury agent at New Orleans on the 13 June, 1865, amounting to $88.06, and also the internal-revenue tax on the eleven bales of cotton returned to him on the 26th June, 1865, amounting to $90.14.

16 III. The defendants are not entitled to recover the internal-revenue tax on the four bales of cotton exacted and withheld from the claimant by the Treasury agent at New Orleans on the 13 June, 1865.

IV. Judgment should be entered for the claimant for the balance remaining after deducting said set-off in favor of the defendants, to wit, $725.00.

By the court.

Filed June 1st, 1876.

17 In the Court of Claims.

EDWARD A. YORKE
*vs.* } No. 6348.
THE UNITED STATES.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above entitled cause, and the final judgment of the court thereon; of the application of the Attorney-General for the defendants for the allowance of an appeal, as filed in the clerk's office August 26, 1876, and of the order of the chief justice of said court allowing the same; of the findings of the court, and the conclusions of law thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this ninth day of October, A. D. 1876.

[SEAL.]

JOHN RANDOLPH,
*Ass't Clerk Court of Claims.*

(Indorsement on cover:) No. 529. The United States, appellants, vs. Edward A. Yorke. Court of Claims. Filed 14th October, 1876.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1877.

NOS. 522, 523, AND 526. UNITED STATES, APPELLANT, *vs.* NORTON.
NO. 524. UNITED STATES, APPELLANT, *vs.* WHITE ET AL.
NO. 525. UNITED STATES, APPELLANT, *vs.* BONNAFON.
NO. 527. UNITED STATES, APPELLANT, *vs.* LEVY ET AL.
NO. 528. UNITED STATES, APPELLANT, *vs.* ROMAN ET AL.
NO. 529. UNITED STATES, APPELLANT, *vs.* YORKE.

APPEALS FROM THE COURT OF CLAIMS.

ARGUMENT FOR THE UNITED STATES.
SUBMITTED UNDER RULE XX.

# In the Supreme Court of the United States.

## OCTOBER TERM, 1877.

**Nos. 522, 523, AND 526. UNITED STATES, APPELLANT, *vs.* NORTON.**

**No. 524. UNITED STATES, APPELLANT, *vs.* WHITE ET AL.**

**No. 525. UNITED STATES, APPELLANT, *vs.* BONNAFON.**

**No. 527. UNITED STATES, APPELLANT, *vs.* LEVY ET AL.**

**No. 528. UNITED STATES, APPELLANT, *vs.* ROMAN ET AL.**

**No. 529. UNITED STATES, APPELLANT, *vs.* YORKE.**

## APPEALS FROM THE COURT OF CLAIMS.

ARGUMENT FOR THE UNITED STATES.
SUBMITTED UNDER RULE XX.

### STATEMENT.

There is such similarity in the facts of these eight cases, and in the legal questions arising thereon, as to make it expedient as well as convenient to submit them upon one brief, though there are points of difference between them to be noticed. The statement of the claimants' counsel, contained in their brief—of which we have been courteously permitted the use and benefit of an advance copy—is so full that the court is respectfully referred to it, instead of a repetition of it being inserted in this brief.

We will, however, here insert the statement of the appointment of the special Treasury agent at New Orleans and the regulations which limited and defined that agency.

In pursuance of the eighth section of the act of July 2, 1864, entitled "An act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary States, and to provide for the collection of captured and abandoned property, and the prevention of frauds in States declared in insurrection," Otis N. Cutler was appointed by the Secretary of the Treasury, with the approval of the President, to purchase at New Orleans, La., for the United States, products of States declared in insurrection.

On the 9th day of May, 1865, the Secretary of the Treasury, with the approval of the President, adopted and promulgated, to take effect on the 10th day of that month, the following amended regulations for the purchase of the products of the insurrectionary States on government account:

"I. Agents shall be appointed by the Secretary of the Treasury, with the approval of the President, to purchase for the United States, under special instructions from the Secretary of the Treasury, products of States declared to be in insurrection, at such places as may from time to time be designated by the Secretary of the Treasury as markets or places of purchase."

* * * * * * *

"III. The operations of purchasing agents shall be confined to the single article of cotton, and they shall give public notice at the place to which they may be assigned that they will purchase in accordance with these regulations all cotton not captured or abandoned, *which may be brought to them.*

"IV. To meet the requirements of the eighth section of the act of July 2, 1864, the agents shall receive all cotton *so brought*, and forthwith return to the seller three-fourths thereof, which portion shall be an average grade of the whole, according to the certificate of a sworn expert or sampler.

"V. All cotton purchased and resold by purchasing agents shall be exempt from all fees and all internal taxes, and the agents selling shall mark the same 'free,' and furnish to the purchaser a bill of sale, clearly and accurately describing the character and quantity sold, and containing a certificate that it is exempt from taxes and fees as above."

The general fact applicable to these cases is that each was brought to recover money paid—or the proceeds of cotton delivered—to the special agent of the United States Treasury, at New Orleans, in June, 1865, by parties who allege themselves and the agent to have been alike unaware of the President's proclamations, dated June 13 and 24, 1865 (13 Stats., 763 and 769), removing the restrictions upon trade (except as to certain contraband articles) and commercial intercourse in the States lately in rebellion.

The chief special distinction which we wish to notice is that in Nos. 522, 523 (United States *v.* Norton), 527 (*v.* Levy), 528 (*v.* Roman), and 529 (*v.* Yorke) the moneys were paid or cotton delivered *upon* the 13th day of June, 1865.

The other three cases are like Lapeyre's, but we do not admit that these five are; because these transactions were on the day the first proclamation bears date, whereas Lapeyre's and the others were subsequently to June 24, even if in ignorance of the proclamation of that date.

### ASSIGNMENT OF ERRORS.

The conclusions of law stated and judgments rendered in accordance therewith in these several cases are assigned for error.

## BRIEF.

### I.

The claimants assume that the day when these proclamations became effective was that of their respective dates, without regard to the time of their promulgation, resting upon the opinion per Swayne, J., in Lapeyre's case (17 Wall., 195).

It is not proposed to discuss at length a subject twice argued in Lapeyre's case, and so carefully considered by the court; but as both courts divided equally upon it (so nearly as that is possible), we trust it may be reconsidered, and a decision made sustaining the view then and now taken by the government.

### II.

It matters not whether the plaintiff's payments were voluntary or involuntary; they must have been one or the other; and in neither case can they be recovered in the Court of Claims.

1. A voluntary payment cannot be reclaimed in *any* court. *Volenti, non fit*, &c. (Elliott *v.* Swartout, 10 Peters, 137; Cunningham *v.* Monroe, 15 Gray, 471, and the

many cases there cited by Judge Abbott, counsel for the defendants; Ellston *v.* Chicago, 40 Ill., 518, 519; Mayor *v.* Lefferman, 4 Gill, 426; Fellows *v.* Sch. Dist., 39 Maine, 561; Benson *v.* Monroe, 7 Cush., 125.)

That this was voluntary, so far as any act upon the part of the Treasury agent is concerned, is obvious. Conceding the many cases cited by claimant to have been correctly determined, they have no applicability to the present case. In every instance cited the party to whom payment was made either already had actual possession of the plaintiff's goods and refused to restore them, or else had an apparently legal process in his hands, under the color of which he threatened to seize and detain them. Such was not the status as to this cotton. The Treasury agent had no possession nor control of it until the owners, of their own motion, upon the 13th of June, 1865, gave him a bill of sale of it and he immediately re-billed three-quarters of it to them. It was brought by the owners to Cutler; they gave him paper title; without any offer, proposal, threat, or process whatever on his part; and it was *only* because they gave him title that any action of his was required or had. It was all one transaction, as the court find. It was not so in any of the cases claimants cite. *E. g.*, on page 20, Astley *v.* Reynolds, 2 Str., 915, the decision rested upon the fact that the plaintiff had not "his freedom of exercising his will," because his goods had been pawned three years before, and the exaction was *one not contemplated when they were put in pledge.* So of the citations upon the two succeeding pages of the brief, except that of Atlee *v.* Backhouse, 3 M. & W., 632 (at top of page 22 of brief), where the goods were seized by the officer, and not voluntarily delivered to him.

In *all* of the cases upon pages 23 to 29 (Glass Co. *v.* Boston, 4 Met., 181, &c., &c.) the taxes were paid to avoid the execution of process *actually issued*, and the enforcement of which was threatened, or by means of which the property was *then* detained.

It has been held that the payment of an illegal tax, before any process has issued for its collection, is so far voluntary that it cannot be recovered, because the payer is "*under no compulsion which the law recognizes as a ground of recovery.*" (Barrett *v.* Cambridge, 10 Allen, 48, citing 4 Met., 181; Forbes *v.* Appleton, 5 Cush., 117, 118; Lee *v.* Templeton, 13 Gray, 476. See also Walker *v.* Saint Louis, 15 Mo., 563, and the numerous cases there cited; Christy *v.* Saint Louis, 20 Mo., 143; State *v.* Powell, 44 Mo., 436; Nickodemus *v.* East Saginaw, 25 Mich., 458, 459.)

If it be argued that the statute and regulations operated as the compulsion in these cases at bar, the ready response is, that they were so no longer than they existed; if in force, their compulsive effect was legal and proper; if rescinded, they had no such effect and operation. Even their supposed existence, after their actual repeal, would be no more of a compulsion than were the tax-acts which the paying citizens of Cambridge and St. Louis (in the before-mentioned cases) thought to be valid, but which were subsequently declared unconstitutional. Indeed, it may be here remarked that, while the assessment laws affect the person or property of every citizen, *nolens volens*, this intercourse act only provided for the purchase of such cotton as the owners might voluntarily bring to the Treasury agent.

"Testing the case by this principle, it is manifest that the expenditure made by the plaintiff has none of the characteristics of a payment by compulsion." (Mayor *v.* Lefferman, 4 Gill, 436, further quoted below.)

2. If there was any misapprehension which led to these payments, it was a *mistake of law.*

We question, for reasons to be presently stated, whether the action of the Treasury agent can be deemed that of the government; but if it can, it is admitted that he acted in good faith, attempting to carry out what all parties suppose to be the law. It would seem that the claimants, acting upon their own volition, brought him their cotton and executed bills of sale of it to him; and he at once reconveyed three-quarters of it, without query, process, threats, or discussion about it. If the United States made any demand upon them, it was in the form of a statute. Recurring to and continuing the quotation from the opinion of the Maryland court, we say: "Testing the case before us by this principle, it is manifest that the expenditure made by the plaintiff has none of the characteristics of a payment by compulsion. It is the clear case of an act performed by the plaintiff in obedience to the demand of the defendants, *conscientiously and honestly preferred; which the plaintiff regarded at the time as lawful and just, but in which it appears from subsequent events he was mistaken. It is the plain case of an expenditure voluntarily and freely made by the appellee, in the belief that he was performing his duty, but under a misapprehension of his legal responsibility."* (Mayor *v.* Lefferman, 4 Gill, 436.)

"*No case can be found,*" says Breese, J., "*where money has been voluntarily paid, with a full knowledge of the facts and circumstances under which it was demanded, which holds* *that it can be recovered back upon the ground that the payment was under a misapprehension of the legal rights and obligations of the party paying.* And it is *invariably* held that a payment is not to be regarded as compulsory, unless made to relieve the person or property from an *actual and existing* duress *imposed upon him by the party to whom the money is paid;* and such is the tenor of all the cases cited by the appellants, from Valpey *v.* Bate, 50 Eng. C. L., 602, to Lazell *v.* Miller, 15 Mass., 207. No well-considered case, anywhere, has proceeded upon different principles." Elston *v.* Chicago, 40 Ill., 518, 519, Newell *v.* March, 8 Iredell, 441, and authorities *passim.*)

Both opinions in Lapeyre's case proceed upon the assumption that these proclamations were the same as statutes in their legal effect. Then ignorance of them is ignorance of law; mistake as to them is mistake of law. They are the law of the land.

3. These suits were instituted in the Court of Claims against the government. If they can there be sustained, it must be because based upon some *contract*, expressed or implied, between the litigants. (R. S., sec. 1059; Gibbons *v.* United States, 8 Wall., 269.)

There was no *express* contract for the United States to take certain cotton, make sale of it for the owners, and return them the proceeds. No officer of the government would have the right to make it a cotton-factor for individuals; nor was this attempted. If no such contract would have been expressly made, it cannot be implied; for the law will not assume by implication that aught was done which could not be accomplished by express contract; nor when the circumstances repel all implication of a promise in fact. (Simpson *v.* Bowden, 33 Maine, 552, top.; Whiting *v.* Sullivan, 7 Mass., 107; Watson *v.* Stever, 25 Mich., 386.)

If there is any *implied* contract, it is based upon an alleged *tort*, whereby certain moneys, representing property of the plaintiffs, came into the Federal Treasury; which tort the plaintiffs profess to waive, and to receive only the moneys resulting therefrom.

But, as the Illinois court said *ubi supra*, the payment to be compulsory, must be to relieve property "from an actual and existing duress *imposed upon him* [plaintiff] *by him to whom the money is paid.*" (40 Ill., 519, top.) The *United States* never imposed any duress upon these parties. The United States never exacted any payment from them except by the statute in question. The moment that law was annulled, *eo instanti* all compulsion and exaction by the government ended; and from that instant no agent or employé of the United States, though claiming to act officially, had any authority to impose any constraint. The agency was revoked. No man is appointed to commit torts for the sovereignty. It can commit none. If injury be done, it is imputed to the officer and not to the state. (See Metz *v.* Soule, 40 Iowa, 239—241; 1 Perry on Trusts, §§, 40, 41; Chitty on Prerog., 38, 39.)

If it was the tort of the Treasury agent, waiving *his* tort gives no right of action against the United States, even if the Federal Treasury was benefited thereby. Gibbons *v.* United States, 8 Wall., 275, where (as here) the government received property for less than its market value.

In the present cases, however, nobody did or intended any wrong.

4. *Non constat* but that the law was in force at the moment these sums were paid, which the agent received June 13, 1865, and which are reclaimed in Nos. 522, 523, 527, 528, and 529.

Up to the performance of the act of signing the proclamation, or of delivering it into the State Department, it was not merely the agent's right but his duty to receive all cotton brought to him under the existing law and regulations. No fiction of law can be resorted to whereby an act shall be made wrongful and tortious which at the time of its commission was lawful and meritorious. It would be unnecessarily and unjustly giving a retroactive, if not *ex post facto*, effect to a statute, so to construe it. It is presumed that officers do their duty, and that a citizen has not perverted his position for the purpose of wronging his fellow; and if this presumption will not supply proof of a substantive fact, it will make it incumbent upon him who says that such wrong and official oppression has been committed to prove it.

Referring to the Constitutional duty of the President to sign such bills as meet his approval, Story, J., says: "It is the act of approval which makes it a law; and until that act is done, it is not a law. *The approval cannot look backwards, and by relation make that a law* AT ANY ANTECEDENT PERIOD OF THE SAME DAY, *which was not so before the approval*; for the general rule is *lex prospicit non* *respicit.* The law prescribes a rule for the future, not for the past; or, as it is sometimes expressed, "*Lex dat forman futuris, non preteritis negotiis.*" (Ex parte Richardson, 2 Story, 580, top.)

This is one of the very many cases in which it becomes the duty of the plaintiff to show and the privilege of the court to understand at what *hour* of the day a law becomes operative. (Gardner *v.* Collector, 6 Wall., 499.)

Lord Campbell, C. J., said: "*You must*, indeed, *regard the fraction in cases where you have to determine the rights of contending parties*, each insisting on their portion of the time." (Regina *v.* St. Mary, 1 El. & Bl., *827.)

In Chick *v.* Smith, 8 Dowl., Pr. Cas., 340, the opinion of Patteson, J., is in a dozen lines, to wit: "I think *quacunque via* the rule must be made absolute. If no fraction of a day is to be considered, I must take the death and the issuing of the writ to be contemporaneous; whereas the writ ought to have been issued before the death of the defendant. But I need hardly put the case on that point. *The good sense of the matter is, that where it is necessary to show which was the first of two acts, the court is at liberty to consider fractions of a day. The rule of law would otherwise be absurd.* In the present case, the rule must be discharged with costs, if no action is brought; but without costs, if the parties think proper to avail themselves is their right of action."

"A day, in legal consideration, is *punctum temporis*, and the law knows no fractions of it; and *yet, when justice requires, this maxim yields*," &c. (Brainerd *v.* Bushnell, 11 Conn., 24, lower half; Lemon *v.* Staats, 1 Cowen, 594; Small *v.* McChesney, 3 Cowen, 19; Rogers *v.* Beach, 18 Wend., 533–4; Havens *v.* Dibble, *Id.*, 655; Clute *v.* Clute, 3 Denio, 264; Blydenburg *v.* Cotheal, 4 N. Y.; (Comst)., 418; Jones *v.* Porter, 6 Howd., Pr., 286.)

"The time of the approval of the executive is a fact which can be ascertained and proved; and in all cases where the rights of parties are in any manner to be affected by the time of the approval, an investigation of the question, when did the event—the passage of the act—occur, should be had." (People *v.* Clark, 1 Cal., 407, near bottom. See also the middle of the next page for still stronger language, stating the facts, and citing 11 Conn., 17.) As mentioned by Hunt, J., in Lapeyre's case, 17 Wall., 203, near bottom, this rule and exception are noticed and acknowledged in the case of Wellman, 20 Vt., 656, middle.

In 1865, the Illinois court said: "It is true that for many purposes the law knows no division of a day, but *whenever* it becomes important to the ends of justice, or *in order to decide upon conflicting interests, the law will look into fractions of a day as readily as into the fractions of any other unit of time.* (2 Bla. Com., 140, notes.) The rule is purely one *of convenience*, which must give way whenever the rights of parties require it. There is no indivisible unity about a day which forbids us in legal proceedings to consider its component hours, any more than about a month which restrains us from regarding its constituent days. *The law is not made of such unreasonable and arbitrary rules.*" Grosvenor *v.* Magill, 37 Ill., 240, 241, where a party having till the middle of August for performance was held entitled to have until the noon of the 16th of the month for that purpose. See also Ferris *v.* Ward, 9 Ill. (4 Gilm.), 506, middle.

"It has been repeatedly held that the general rule that the law admits of no fractions of a day is a mere legal fiction; that it is subject to numerous exceptions, and that whenever it becomes necessary to determine

of several persons has a priority of right, time
be distinguished with accuracy. In the case of Cal-
n *v.* Hallowell (2 Bay, 9,) the court said: 'Time is in
ature essentially divisible, from years down to hours
minutes; a minute will therefore give priority as es-
tially in point of time as a year or a day.'" (Tufts *v.*
radine, 3 La. An., 431, lower part; Callihan *v.* Hal-
vell, 2 Bay, 9.)

Story, J., declared this doctrine, that in law there is
fraction of a day, "true only *sub modo*, and in a very
nited sense, where it will promote the right and jus-
ce of the case. It is a mere legal fiction, and, there-
re, like all other legal fictions, is never allowed to oper-
te against the right and justice of the case. On the con-
rary, the very truth and facts, in point of time, may
lways be averred and proved in furtherance of the right
nd justice of the case; and there may even be priority
n an instant of time; or, in other words, it may have a
beginning and an end." (Ex. p. Richardson, 2 Story, 577, citing Digges's case, 1 Co. Rep., 174; Fitzwilliam's case, 6 Co. Rep., 33, &c., &c.; Wrangham *v.* Hersey, 3 Wils., 274.)

There is no evidence at what hour these payments were made. If the horal divisions are not noticed, they must be presumed to have happened *contemporaneously with the issuing of the proclamation;* "and *it has never been disputed*, nor was it contended upon the argument, but that *the Crown in such cases has priority over the subject.* This point is too clear to need any confirmation by authority." (Edwards *v.* Reginam, 9 Exch., 632, per Coleridge, J., giving opinion of the court.)

The question at what time in the day the law was terminated by the proclamation of June 24, 1865, was not raised by Lapeyre's case, as the reports of that case state its facts, and the proclamation of June 13 did not come before the court at all.

The learned judge who gave the opinion of the Court of Claims in the cases now argued (see record in No. 522, United States *v.* Norton, page 6, near middle) errs when he states the 24th of June, 1865, as "the day when the transaction between the claimant and the government was consummated." Reference to the reports in 17 Wall., 192, near bottom, and 8 Ct. of Cls., 167, near bottom, shows that Lapeyre's "transaction" was completed June 26, 1865, two days after the date of the last proclamation, whereas De Bow's (in No. 522) was June 13, 1865.

The plaintiffs, setting up the wrongful reception of money, which they say they are entitled *ex æquo et bono* to recover, should show it was wrongfully obtained. It is not inequitable to retain it, unless at first wrongfully extorted. Charging this is accusing the government and its officers both with wrong-doing. As before observed, the presumption is that officials and citizens obey the law and do their duty; and although this presumption cannot supply the place of proof of a substantial fact, it may and does make it incumbent on him who disputes it to furnish the requisite proof of the alleged fact. (2 Wharton on Ev., § 1318, citing nearly forty cases; among them Ross *v.* Reed, 1 Wheat., 486; Phila. &c., R. R. Co. *v.* Stimpson, 14 Peters, 458; Minter *v.* Crommelin, 18 Howd., 88; United States *v.* Weed, 5 Wall., 62; Jones *v.* Baird, 7 Jones's Law, 152.)

It has never been judicially considered inequitable to retain money received as and for a void tax, if paid without the compulsion of process issued against the person or the property of the citizen. (Barrett *v.* Cambridge, 10 Allen, 48; Christy *v.* Saint Louis, 20 Mo., 143; and other cases hereinbefore cited.)

### III.

Certainly, if not voluntary, the payments were (as the petitioners' counsel claim throughout their argument) involuntary, extorted from the claimants illegally, by the compulsive effect of a wrongful detention of their goods. That is, it was a *tort.* But of the *tortious* acts of the agents of the government the Court of Claims cannot take cognizance, and these causes must be dismissed for want of jurisdiction. (Gibbons *v.* United States, 8 Wall, 275.)

True, a plaintiff, as against another individual, can sometimes waive the tort and sue in assumpsit; but not where, in waiving the tort, he waives the whole cause of action.

It is only when the tort, though the gist of the transaction, *arises out of a contract,* that the plaintiff has an election. (Stoyle *v.* Wescott, 2 Day, 422; Buckley *v.* Storer, *Id.*, 531. Also, see Vasse *v.* Smith, 6 Cranch, 231, top, to be briefly noticed below.)

An election of actions is permissible only where the suit, in either form, may be brought in the same forum. As it seldom happens that there is this difference, no great number of authorities can be cited, but the assertion is based upon reason. In Mann *v.* Kendall, 2 Jones (Law), 193, lower half, it is said: "The right of a party in certain cases to waive a tort and sue as in contract is not denied; the cases referred to by the counsel of the plaintiff fully show it; but none of them meet this case; *none of them recognize the principle that by waiving the tort a new jurisdiction can be acquired.* This is decided in Clark *v.* Dupree, 2 Dev., 411. Assumpsit cannot be maintained by a single magistrate, upon an implied promise, where the plaintiff has an election to sue either in tort or contract. *No court can hold jurisdiction of the assumpsit but one which can give a remedy on the tort itself; for the reason that the same questions of law arise in each."* This italicized statement is quoted from 2 Dev., 412, near bottom, where the opinion is by Ruffin, J., whose equal as a jurist seldom adorns any State tribunal. "The language of the statutes which confer jurisdiction upon the Court of Claims excludes by the strongest implication demands against the government *founded* on torts." (Gibbons *v.* United States, 8 Wall., 275, middle; Morgan *v.* United States, 14 Wall., 535, last sentence of opinion, per Davis, J.; Briggs *v.* Light-Boats, 11 Allen, 157.)

The statute would be nullified, almost, if in every case really dependent upon the tortious act of an officer, in which the government receives some apparent or incidental benefit, the tort could be waived, yet the imagined assumpsit, founded only upon it, could be made the basis of a suit.

The limitation of the Court of Claims to the consideration of contracts was based upon the theory that the State could do no wrong; that is, if by an inadvertence wrong was inflicted upon a subject by the act of the sovereign, it would be redressed by that organization (Congress) which represents its will and grace, and not through the tribunal which renders judgment only upon judicial proof.

"A subject may have a clear right, but no remedy; in such case he must petition the legislative power, and there is no reason to suppose his right would be refused." (Broom's Const. Law, pp. 241 and 723; 1 Perry on Trusts, §§ 40, 41; Metz *v.* Soule, 40 Iowa, 240.) "The arms of equity are very short against the prerogative." (Pawlett *v.* Attorney-General, Hard., 467, and other cases cited in note 1 to 1 Perry on Trusts, § 40.)

## IV.

In order to fulfill the stipulation to submit this cause, this brief must be concluded. We agree in opinion with the claimants that the act forbidding assignments, and the decision in Gilliss's case, do not affect assignees in bankruptcy; but if we err together in this respect the court will set us right.

CHARLES DEVENS,
*Attorney-General.*
EDWIN B. SMITH,
*Assistant Attorney-General.*

# Supreme Court of the United States.

## APPEALS FROM THE COURT OF CLAIMS.

No. 522.—The United States, Appellants, *vs.* E. E. Norton, Assignee in Bankruptcy of B. De Bow & Co.

No. 523.—The United States, Appellants, *vs.* E. E. Norton, Assignee in Bankruptcy of D. Cerf.

No. 524.—The United States, Appellants, *vs.* J. A. White and Augustus R Montgomery.

No. 525.—The United States, Appellants, *vs.* J. A. Bonnafon.

No. 526.—The United States, Appellants, *vs.* E. E, Norton, Assignee in Bankruptcy of B. P. Ethell.

No. 527.—The United States, Appellants, *vs.* Jonas H. Levy and Anderson D. Dieter.

No. 528.—The United States, Appellants, *vs.* Charles Roman and O. C. Olivier.

No. 529.—The United States, Appellants, *vs.* Edward A. Yorke.

## BRIEF FOR APPELLEES.

SUBMITTED UNDER RULE TWENTY.

Edward Janin,

*Of Counsel for Appellees.*

Judd & Detweiler, Prs.

# Supreme Court of the United States.

## APPEALS FROM THE COURT OF CLAIMS.

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No. 528.—The United States, Appellants, *vs.* Charles Roman and O. C. Olivier.

No. 529.—The United States, Appellants, *vs.* Edward A. Yorke.

BRIEF FOR APPELLEES—Submitted under Rule Twenty.

Considerably more than half of this brief consists of quotations *in extenso* from authorities.

## STATEMENT OF THE CASES.

*The facts in all are substantially identical with each other, and with those in Lapeyre* vs. *The United States*, 17 *Wall.*, 191.

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### No. 522.— United States *vs.* E. E. Norton, Assignee in Bankruptcy of B. De Bow & Co.

Claim upon implied contract as for money had and received, being the sum illegally exacted, June 13th, 1865, from De Bow & Co., by the Government agent at New Orleans, as a bonus upon the importation of 125 bales of cotton, (under sec. 8, act of July 2, 1864, and Treasury Regulations, of May 9, 1865,) and by him paid into the United States Treasury. The cotton came from the east of the Mississippi, and the exaction was forbidden by the Presidential Proclamation of June 13, 1865, (13 S. L., 763,) which removed all restrictions upon trade in territory east of the Mississippi river. At the time of this exaction the Government agent had possession of the cotton. No set-off was claimed.

Judgment for $3,208.66.

A separate claim for proceeds of 5 bales of cotton was rejected by the Court, as this cotton had come from the west of the river, and the exaction took place prior to the Proclamation of June 24, 1865, which first removed restrictions upon trade in territory west of the Mississippi, (13 S. L., 769.) Claimants have not appealed. See appendix for the opinion of the Court of Claims in this case.

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### No. 523.—United States *vs.* E. E. Norton, Assignee in Bankruptcy of D. Cerf.

Claim for *net proceeds* now in the Treasury, of 13 bales of cotton illegally exacted June 13, 1865, as a bonus upon the importation of 54 bales. The exaction took place at New Orleans, and while the 54 bales were in possession of the agent. The 13 bales were sent by the Government agent to New York, and sold, and the judgment is for their net proceeds, less a set-off allowed of the internal revenue tax of two cents per pound on the 41 bales (out of the 54) which were released to Cerf upon his surrender of the 13 bales. The tax on 41 bales was $329.10. Judgment for $1,790.62, net proceeds, now in the Treasury, of 13 bales, less $329.10, amount of internal revenue tax on 41 bales restored.

Judgment for $1,461.52.

The set-off claimed was for the revenue tax on the whole 54 bales.

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### No. 524.—UNITED STATES *vs.* JAMES A. WHITE and AUGUSTUS R. MONTGOMERY.

Claim for net proceeds, now in the Treasury, of 25 bales of cotton, exacted at New Orleans, June 26th, 1865, as a bonus upon the importation into New Orleans (under sec. 8, act 2d July, 1864, and Treasury Regulations of May 9, 1865,) of 101 bales. The cotton came from the west of the Mississippi, but the exaction was illegal by virtue of the Presidential proclamation of June 24, 1865, which removed all restriction upon trade in territory west of the Mississippi, (13 S. L., 769.) At the time of the exaction the 101 bales were all in possession of the agent. The 25 bales were sent to New York by the agent, and sold, and the judgment is for their *net* proceeds, now in the Treasury.

Judgment for $3,443.50.

No set-off was claimed by the Government. This case was tried before No. 523, and before the opinion of the Court of Claims in No. 522, Norton, assignee of DeBow,

was delivered. The cases tried before the delivery of that opinion were—DeBow's case, No. 522.
White and Montgomery's case, No. 524.
J. A. Bonnafon's case, No. 525.
B. P. Ethell's case, No. 526.

(See note following the Opinion of the Court of Claims in DeBow's case, Rec. in No. 522, page 9.)

The United States did not file set-offs in any of these, relying probably upon the Treasury to deduct the amounts, under act of March 3, 1875, (18 S. L., part 3, p. 481.)

In the four cases subsequently tried, Nos. 523, 527, 528, and 529, the United States filed set-offs, though without any apparent necessity for so doing.

### No. 525.—UNITED STATES *vs.* J. A. BONNAFON.

Claim for net proceeds, now in the Treasury, of fifteen bales of cotton, illegally exacted in New Orleans, June 27, 1865, by the Government agent, as the bonus upon the importation into New Orleans of 62 bales. The findings do not state whence the cotton came. That question could not be of the least consequence as, if the cotton came from the east of the river, the case is controlled by the Proclamation of June 13th, and if from the west, then by that of the 24th. In the case of Lapeyre, (17 Wall.,) nobody doubted that the Proclamation of June 24th took effect at least on the 27th, the day of its publication in the newspapers. At the time the 15 bales were exacted, the whole 62 bales were in the possession of the agent. The 15 bales were sent to New York, by the agent, and sold, and the judgment is for the *net proceeds* in the Treasury.

No set-off was claimed.

Judgment for $2,066.10.

### No. 526.—UNITED STATES *vs.* E. E. NORTON, Assignee in Bankruptcy of B. P. ETHELL.

Claim for the net proceeds, now in the Treasury, of 28 bales of cotton, illegally exacted in New Orleans, June 27, 1865, by the Government agent, as a bonus upon the importation into that city ef 113 bales. The whole 113 bales were in the possession of the agent at the time that the surrender of the 28 bales was exacted.

No set-off was claimed.

The judgment is for the net proceeds of the 28 bales which were sent to New York and sold, and which net proceeds are now in the Treasury, $3,856.72.

### No. 527.—UNITED STATES *vs.* JONAS H. LEVY and ANDERSON D. DIETER.

There are two claims in this case:

I. Claim for the net proceeds, covered into the Treasury, of nine bales of cotton, bonus exacted June 13, 1865, at New Orleans, by the Government agent, upon the importation into New Orleans of 36 bales.

The cotton came from the east of the Mississippi, and at the time of the exaction the whole 36 bales were in the possession of the agent. The nine bales were sent to New York, and sold. A set-off was filed of the amount of the two-cent internal revenue tax. The set-off was allowed to the extent of the tax upon the 27 bales restored to claimants out of the 36 bales, amounting to $214.05. The set-off was disallowed, however, as to the tax on the 9 bales, which were not restored to claimants, but sent to New York and sold.

The net proceeds of the nine bales were $1,305. The set-off allowed on the 27 bales restored was $214.05.

The amount allowed in the judgment in respect to this first claim was $1,305, less $214.05, = $1,090.95.

II. The second claim in this case is for the proceeds of three bales, exacted June 27, 1865, as a bonus upon the importation, into New Orleans, of twelve bales, which came from the west of the Mississippi, and were all in possession of the agent at the time of the exaction, June 27, 1865. The three bales were sent to New York and sold. A set off was claimed of two cents a pound upon the whole 12 bales, but was only allowed to the amount of the tax upon the nine bales that were released to the claimant. The set off on the nine bales amounted to $71.98. The net proceeds of the three bales sent to New York and sold were $435. The judgment in respect to this second claim was for $435 less $71.98, = $363.02.

Judgment for the net proceeds of the nine bales of the first claim, and the three bales of the second claim, less the set-offs allowed, $1,454.

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### No. 528.—United States *vs.* Roman & Olivier.

Claim for net proceeds of 35 bales of cotton, exacted at New Orleans, June 13, 1865, by the Government agent, as a bonus upon the importation of 142 bales. The cotton came from the east of the Mississippi, and was all in the possession of the agent at the time of the exaction, June 13, 1865. The 35 bales were sent to New York by the agent and sold.

The net proceeds covered into the Treasury were $4,820.90. The Government filed a set-off of the amount of the internal revenue tax of two cents a pound upon the whole 142 bales, but it was allowed only to the amount of the tax upon the 107 bales that were restored to the claimants, and was disallowed as to the remaining 35 bales sent to New York and sold by the United States.

The set-off allowed on the 107 bales amounted to $848.94.

The judgment is for the net proceeds of the 35 bales, less the set-off of $848.94, = $3,971.96.

The opinion of the Court of Claims on the question of set-off appears in the Record of this case, No. 528, pp. 4, 5, and in the Appendix to this Brief.

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### No. 529.—UNITED STATES *vs.* EDWARD A. YORKE.

There are two claims in this case.

I. Claim for $352.24, money paid June 13, 1865, as a bonus upon the importation into New Orleans of 10 bales of cotton from the East of the Mississippi. The 10 bales of cotton were in possession of the agent at the time of the exaction. Upon the payment of the $352.24 the ten bales were released to claimant, and the agent has paid the money into the Treasury. The United States filed a set-off of the amount of the internal revenue tax on the whole ten bales, (and on 15 bales involved in the second claim, 25 bales in all,) and the set-off was allowed upon the whole ten bales, as they had been all restored to claimant, he having paid the bonus in money.

The amount of this set-off was $88.06.

This first claim was allowed to the extent of the bonus paid, $352.24, less the set-off claimed of $88.06=$264.18.

II. The second claim in this case was for the proceeds of four bales of cotton exacted June 26, 1865, as the bonus upon the importation of 15 bales. The whole 15 bales came from the west of the Mississippi, and were in the possession of the Government agent at the time of the exaction, June 26, 1865.

The four bales were sent to New York and sold. The net proceeds were $550.96. The Government filed a set-off of the two cent tax upon the whole 15 bales. The set-off was allowed as to the 11 bales released to claimant, but disallowed as to the four bales which the United States took from him, sent to New York and sold. The amount of set-off on the 11 bales was $90.14. This second claim was allowed for $550.96, less $90.14 = $460.82.

The judgment in the whole case is for $725.

Both parties to the transactions in these eight cases acted in ignorance of the illegality of the exactions, not knowing of the proclamations of June 13th and 24th. The Government agent acted with perfect moral honesty, paying over the money, where he received it, and sending the cotton where the bonus was paid in kind, to New York, as the Treasury Regulations directed. No interest has been allowed.

The facts in these eight cases are substantially identical, and consequently the Court of Claims has rendered an opinion on the main question involved, in only one (the first) of them, that of Norton, assignee of DeBow & Co., No. 522, (Rec., 6–9; 11 C. Cls. Rep., 676.) See this Opinion in the Appendix to this brief.

The facts of these cases are substantially identical, too, with those of Lapeyre *vs.* United States, (17 Wall., 191.) The Court of Claims says, in its Opinion, (DeBow *et al.* *vs.* The United States, 11 C. Cls., 672; Record in No. 522, p. 6, and Appendix to this Brief:)

> "The counsel for the claimant insists that the facts in this case are substantially identical with those in the case of Lapeyre, (8 C. Cls., R., p. 165,) and that the decision of this Court must necessarily follow that of the Sureme Court in that case. The counsel for the defendants is understood to concede the substantial identity of the facts, but to insist that the legal ground upon which the defense is now placed, was not taken by the defendants' counsel in the case of Lapeyre, and probably escaped the attention of the Supreme Court when deciding that case."

This ground of defense, supposed to be of importance, but nevertheless to have escaped attention in the Lapeyre case, which was twice argued in each court, is simply that the surrender by Lapeyre to Cutler, the Government agent, of 119 bales of cotton, was a *voluntary* act, although it was his only means of getting possession of 367 other bales, which, together with the 119 bales, were in the custody of the Government agent. In Lapeyre's case this Court ordered judgment for the claimant, either because, as suggested by counsel below in the present cases, it overlooked the voluntary character of Lapeyre's surrender of his 119 bales, or, as we feel very sure indeed, because the surrender was so very clearly compulsory, that it would have been "an abuse of language" to call it anything else; for which reason this Court spent no time in discussing its character.

The material facts found by the Court of Claims in the Lapeyre case, are set out in the report of the decision of that case by this Court, contained in 8 Court of Claims Reports, page 165, in more detail than in the report in 17 Wallace. Your honors are aware that the Court of Claims Reports contain independent reports of the decisions of the Supreme Court, in cases appealed from the Court of Claims.

The report in 8 Court of Claims Reports contains the material portions of the Treasury Regulations, of May 9th, 1865, referred to in the findings in the present cases.

Comparing the facts of the Lapeyre case, as set out in 17 Wall., and 8 Court of Claims Reports, with the findings of fact in the present cases, it will be seen that the only difference of detail, at all of moment, is in respect to the Presidential Proclamations involved. As the cotton in Lapeyre's case had all come from the west of the Mississippi, the question of the claimant's right to recover turned entirely upon the effect and the date of operation of the Presidential Proclamation of June 24, 1865, (13 S. L., p. 769,) which removed all impositions and restrictions upon trade in territory West of the Mississippi. In some of the present cases, on the other hand, the claimant's right depends upon a prior proclamation—that of June 13, 1865, (13 S. L., 763,) which terminated restrictions upon trade in the territory East of the Mississippi—in other words, some of the cotton of which the proceeds are here sought to be recovered, came from the east of the river, and was surrendered to the Government agent, prior to June 24th, 1865, but on or after June 13, 1865, and other portions of the cotton came from the west of the river, but were surrendered on or after June 24th, 1865.

In the Lapeyre case, the defense showed that the Proclamation of June 24th, was not published in the newspapers until June 27th, but there is no evidence in any of the present cases as to when the Proclamation of June 13th was published. Upon the assumption, however, that under the decision in Lapeyre's case, it is settled that the Proclamation of June 24th took effect at its date, and that the Proclamation of June 13th, in the absence of any evidence showing the date of its publication, must likewise be considered to have taken effect at its date—upon these assumptions, and from the fact that the claimants do not question the action of the Court of Claims in any respect, in any of these cases, the discussion of all these appeals may perfectly well take place with special reference to the findings of facts in a single one of them, viz: the first, that of E. E. Norton, assignee in bankruptcy of De Bow & Co., No. 522, except that as to four of these cases, where the defendants filed set-offs (viz: in Nos. 523, 527, 528, and 529) we refer the Court to the opinion of the Court of Claims allowing the set-offs, in whole or in part, which opinion is found on pages 4 and 5 of the Record, in No. 528, the United States *vs.* Charles Roman and O. C. Olivier, (11 Ct. C. Rep., 761,) and in the appendix to this brief.

No set-offs were filed in Nos. 522, 524, 525, and 526, and none were allowed. We do not complain of the allowance of the set-offs in the other four cases.

# ARGUMENT.

No. 522.—UNITED STATES *vs.* NORTON, Assignee in Bankruptcy of DE BOW & Co.

This claim was for the recovery, in the first place, of the sum of $3,208.66 paid by DeBow & Co., June 13, 1865, to the Government purchasing agent at New Orleans, as a bonus upon the privilege of importing one hundred and twenty-five bales of cotton. This charge was imposed upon DeBow & Co. under section 8 of the act of Congress of July 2, 1864, (13 Stat., 375, § 8,) and the Treasury regulations made in pursuance thereof.

By said section 8 it was enacted:

> "That it shall be lawful for the Secretary of the Treasury, with the approval of the President, to authorize agents to purchase for the United States any products of States declared in insurrection, at such places therein as shall be designated by him, at such prices as shall be agreed on with the seller, not exceeding the market value thereof at the place of delivery, nor exceeding three fourths of the market value thereof in the city of New York at the latest quotations known to the agent purchasing," &c.

By the "Amended regulations for the purchase of the products of the insurrectionary States on Government account," issued by the Treasury Department, May 9, 1865, it was provided:

* * * * * *

> "III. The operations of purchasing agents shall be confined to the single article of cotton; and they shall give public notice at the place to which they may be assigned that they will purchase, in accordance with these regulations, all cotton not captured or abandoned which may be brought to them.
>
> "IV. To meet the requirements of the 8th section of the

act of July 2, 1864, the agents shall receive all cotton so brought, and forthwith return to the seller three-fourths thereof which portion shall be an average grade of the whole, according to the certificate of a sworn expert or sampler.

"V. All cotton purchased and resold by purchasing agents shall be exempt from all fees and all internal taxes. And the agent selling shall mark the same "free" and furnish to the purchaser a bill of sale clearly and accurately describing the character and quantity sold, and containing a certificate that it is exempt from taxes and fees as above.

"VI. Purchasing agents shall keep a full and accurate record of all their transactions, including the names of all persons from whom they make purchases, the date of the purchase, a description of the cotton purchased by them, and the quantity and quality thereof; also of the one-quarter retained by them. A transcript of this record will be transmitted to the Secretary of the Treasury on the first day of each month.

"VII. Sales of the cotton retained by the purchasing agents under regulation IV, as the difference between three-fourths the market price and the full price thereof in the city of New York, may be made by such agents at such places and times, and in such manner as may be directed in special instructions from the Secretary of the Treasury. Where such sales are not so authorized, the agents shall, without delay, ship it to New York on the best terms possible, consigned, until otherwise directed, to S. Draper, cotton agent and disbursing officer at that place. Bills of lading in triplicate for such shipment must be taken, one of which shall be sent to the agent at New York, one to the Secretary of the Treasury, and one retained by the purchasing agent."

These regulations were approved by the President. (See 8 Ct. Claims, 166, Lapeyre *vs.* U. S.)

As the importation of cotton from the insurrectionary States into New Orleans was unlawful unless made in pursuance of the Treasury regulations, it is obvious that the necessity put upon the importer of complying with them by, in effect, giving up one fourth of his cotton to the Government in order to obtain the other three-fourths, was an imposition and restriction upon trade. The abandonment of one-fourth of the cotton in kind, or the payment to the Government in money, of one-fourth of the New York value of the cotton, amounted to the payment of a tax or war duty.

Under these regulations the firm of DeBow & Co., the claimants' assignors in bankruptcy, (Findings, Rec. 4.) imported into New Orleans, in June, 1865, one hundred and twenty-five bales of cotton, and on June 13, 1865, made a bill of sale of it to Cutler, the purchasing agent, nominally for the sum of $9,625.98, three-fourths of its value, he, on the same day, making a bill of sale back to them for the same cotton for the sum of $12,834.46, its full value, receiving the difference of $3,208.66, or 25 per cent. of the whole value, as the tax or bonus. (Finding 1; Rec.; 4.)

This process by which the Government accepted a fourth of the value of the cotton, in lieu of one fourth of the cotton itself, was a substantial compliance with the regulations, and saved the Government the trouble and expense of a sale of its share.

This cotton came from Vicksburg, east of the Mississippi; New Orleans is on the same side. "At that time no shipments of cotton to New Orleans were allowed except such as were consigned to the purchasing agent of the Treasury. The money received by the agent has been paid by him into the Treasury." (Finding 1, Rec. in No. 522, page 4.)

On the day of the payment aforesaid, viz: June 13th, 1865, the President issued a proclamation (13 S. L., 763,) which reads as follows:

"Now, therefore, be it known that I, Andrew Johnson, President of the United States, do hereby declare that all restrictions upon internal, domestic, and coastwise intercourse and trade, and upon the removal of products of States heretofore declared in insurrection * * * heretofore imposed in the territory of the United States east of the Mississippi river, are annulled, and I do hereby direct that they be forthwith removed."

In consequence of this proclamation the collection of the aforesaid sum of $3,208.66 from DeBow & Co., on June 13, 1865, was illegal.

The terms of this proclamation are obviously identical in their effect with those of the proclamation of June 24, 1865, (13 S. L., 769,) considered in the case of Lapeyre, and which reads as follows:

> "Now, therefore, be it known that I, Andrew Johnson, President of the United States, do hereby declare that all restrictions upon internal, domestic, and coastwise intercourse and trade, and upon the purchase and removal of products of States and parts of States and Territories heretofore declared in insurrection, lying west of the Mississippi river, (excepting only those relating to property heretofore purchased by the agents, or captured by or surrendered to the forces of the United States, * * * ) are annulled, and I do hereby direct that they be forthwith removed," &c.

As to this proclamation of June 24, the Attorney General decided (11 Opinions, 436) that it took effect at its date, and not merely on the 25th, "when it was made public." The Treasury admitted in those days that money obtained by the United States under the circumstances of the present cases must be refunded. See the Opinion, which respected a cotton bonus exacted June 24.

At the time of the transaction neither DeBow & Co. nor the Treasury agent had knowledge of the proclamation of June 13. (Findings, Rec., 4.)

The Court of Claims found, as a conclusion of law, that, (Rec. No. 522, p. 5:)

"1. The Treasury agent in New Orleans, having control and possession of the claimant's cotton brought in from the east bank of the Mississippi, had no authority, on the 13th June, 1865, to retain the same, or one-fourth thereof, nor to exact from the owner a payment equivalent to one-fourth of its value under the act of 2d July, 1864, (13 S. L., 375,) and the owners should recover back the payment so exacted, it having been paid over to the defendants, and being now in the Treasury."

Judgment was rendered for the amount paid by DeBow & Co. to the Government agent, viz: $3,208.66. (Rec., 3.)

The second part of our claim, which was for the proceeds of five bales of cotton surrendered June 14, 1865, was rejected, as this cotton had come from the west of the Mississippi, to which region the proclamation of June 13 did not apply. We have not appealed.

The defendant will now contend that we should not recover the $3,208.66, because, they say, it was a voluntary payment, and made in mutual mistake of law.

To call such a payment voluntary, is, we are justified in saying, a defiance of reason and overwhelming authority. That the payment was made in ignorance on the part of the Government agent of the proclamation of June 13 would be a reasonable defence if we had sued him, as we gave him no notice not to pay over the money, and he has honestly paid it over. This would be a just and legal defence for him (Elliot *vs.* Swartwout, 10 Peters, 137; Benson *vs.* Monroe, 7 Cush., 125) even though a proclamation were not considered a law, but rather a fact from which rights arise, as they do from other facts, such as a release of a claim, etc. In fact, as the Government had undoubtedly a right to exact this bonus or war duty from us *prior to the proclamation*, (Hamilton *vs.* Dillin, 21 Wall., 73; McClelland *vs.* United States, 21 Wall., 98,) and only lost it by that proclamation, it (the proclamation) may, perhaps, be viewed as a release to us, if it be not a law. But that question is of no consequence here. Our plain reply to the defence of the United States is that the payment was in no sense whatever a voluntary one, because the agent had possession of our cotton, and claimed the right, and had the present power to compel the payment as a condition of his giving it up. We are not suing him, but the United States. In none of these cases have we obtained judgment for anything more than the *net* amount which the Government has received from us either in cash, paid by the claimants, or in the *net* proceeds of their cotton when the bonus was paid in kind. The judgments do not allow us a cent of interest, though the Government has had the use of our money for considerably more than ten years; and as for the internal revenue cotton tax, the Government has had its claim of set-off allowed as to all the cotton that was restored to us, in every case where the defence thought fit to file its claim of set-off. (See Records, Nos. 523, 527, 528, 529.)

Even in the cases (Nos. 522, 524, 525, 526) which were the first decided, and where no set-offs were filed, the defence is not likely to lose the tax, since they claim it as a debt from the claimants herein, and the act of March 3d, 1875, 18 S. L., part 3, p. 481, entitled, " An Act to provide for deducting any debt due to the United States from any judgment recovered against the United States by such debtor," gives them, or will be considered by the Treasury to give, the right to deduct the amount from the judgments, should they be affirmed here.

The failure to file set-offs in the four cases first tried (and which were decided in a bunch before the others were tried) was probably due to a consciousness of the power conferred by that act, combined with an apprehension of weakening the argument set up below, "that the owners receiving their cotton freed from the payment of all 'fees' and internal revenue 'taxes' constituted a sufficient consideration to support the transaction."

If the United States were a personal being, the retention of this money would be considered scandalously unconscientious, which would be a sufficient ground for its recovery, even though the payments might otherwise be considered to have been what the law books call "voluntary." (Northrup *vs.* Graves, 19 Conn., 548.) But payments under the circumstances of these cases have never yet, we believe, been called *voluntary* by any court whose decisions have been reported in England or the United States.

It is not strange, therefore, that neither counsel nor Court discussed this totally inapplicable doctrine in the case of Lapeyre.

The assignee in bankruptcy had clearly the right to sue in the Court of Claims, as the assignment vested the claim in him. As to the claim vesting in the assignee, see Comegys *vs.* Vasse, (1 Peters, 191.)

The first section of the act of February 26, 1853, (10 S. L., 170,) invalidating assignments of claims against the United States, did not apply to "involuntary assignments compelled by law." (See United States *vs.* Gillis, October Term, 1877.)

The assignment in bankruptcy is as far as possible removed from being voluntary. The bankrupt neither selects the assignee nor signs the instrument of assignment. The assignee's title comes by "act of law." (2 Kent, 385.)

When the laws of July 29, 1846, (9 S. L., 41,) and of February 26, 1853, were enacted, there was no bankruptcy system in force, nor did the Court of Claims yet exist. The acts of 1853 (sec. 1) forbidding assignments, the act of 1855, establishing the Court of Claims, and the Bankruptcy Act of 1867, were all re-enacted together in the Revised Statutes, and must be read together.

By the act of 1855, any claim against the United States that may be assignable may be sued upon in the Court of Claims in the name of the assignee. (United States *vs.* Gillis.) Revised Statutes, section 5046, vests in the assignee all the rights in equity, choses in action, etc., of the bankrupt, with "the like right, title, power and authority" to sue for the same as the bankrupt had. If the title to a claim against the United States does not pass to the assignee it must remain in the bankrupt, and he is at liberty to recover upon the same in the Court of Claims and collect the judgment, all in his own name, and free from control by the bankruptcy court; for how can that court control the bankrupt in respect to property which the assignee cannot receive any title to? In the case supposed the United States would, on the one hand, discharge the bankrupt, under the act, from the claims of his creditors, and, on the other, forbid the assignee, the creditors' representative, to collect, through its own court, the bankrupt's claim against itself, while leaving the bankrupt himself free to sue for and collect the claim. Such a state of the law would be "unnatural," as was intimated by Judge Story in Comegys *vs.* Vasse, (1 Peters, p. 218.) The assignment in United States *vs.* Gillis was by act of parties, and that suit was under the captured and abandoned property act. These are under the general jurisdiction of the Court of Claims. This Court said, in the case of Gillis:

> "It must be admitted that the act contemplates the possibility of an effective assignment of some claims. What these are it is not necessary now to determine."

And further:

> "Now, the act of 1855 does not declare that any claims against the United States shall be assignable. At most it suggests that claims which are assignable may be sued in the Court of Claims in the name of the assignee, without undertaking to declare what claims may be assigned. That there may be such claims is clearly stated in the act of 1853, and there are devolutions of title by force of law, without any act of parties, or involuntary assignments compelled by law, which may have been in view. There is, therefore, no unnecessary inconsistency between the two acts."

The opinion of the Court of Claims (Record in 522, pp.

6–8) is all the argument we need in these cases. We shall, however, add a fuller statement of the authorities cited therein, and a statement of some more recent decisions.

The Court of Claims says: (11 C. Claims Rep., 678, Rec. in 522, p. 7.)

> "The counsel for the defendants places the defense of this case upon the general rule that a voluntary payment made in mutual mistake of law cannot be recovered back. As to the rule there can be no question, but whether the payment in this case was in legal effect voluntary, is by no means free from doubt.
>
> "The claimant's goods were in the possession of the Treasury agent; he, in the language of Mr. Justice Hunt [in the Lapeyre case], 'had no authority to retain them;' yet he exacted a payment equal to one-fourth of their value as a condition to restoring them to the possession of the owner. In some cases it has been held that such a payment must be deemed to have been made under a moral duress. (Astley *vs.* Reynolds, Str. R., 915; Close *vs.* Phipps, 7 Mann & Gr., 586; Shaw *vs.* Woodcock. 7 Barn. & Cress., 73; Atlee *vs.* Backhouse, 3 Mees. & Wels., 633; Oates *vs.* Hudson, 6 Wels., H. &. G., 346;) in others it has been held that the payment of an illegal tax, or impost, or official charge, is not voluntary, though no protest be made. (Adams' case, 1 C. Cls. R., 306; Boston & Sandwich Glass Co. *vs.* City of Boston, 4 Metcalfe, 181; Amesbury Woolen Co. *vs.* Inhabitants of Amesbury, 17 Mass., 461; Preston *vs.* Boston, 12 Pick., 7; Ripley *vs.* Gelston, 9 Johns., 201; Clinton *vs.* Strong, id., 370; Steele *vs.* Williams, 20 Eng. Law & Eq., 319.) In short there is a current of authorities which hold (apart from some statutory requirement of protest at the time of payment) that a payment made to a public officer who has the power of compulsion behind him, or a payment exacted by an officer *colore officii* as the condition to the delivery of a man's property, is never to be considered a voluntary act. * * * * * And, as was said by Baron Martin in another, (Steele *vs.* Williams;) 'as to whether the payment was voluntary, that has in truth nothing to do with the case' * * * to call it a voluntary payment is an abuse of language * * * * where a party says: "I charge you so much by virtue of an act of parliament," it

matters not whether the money is paid before or after the service was rendered; if he is not entitled to claim it the money may be recovered back.' "

We give now a reasonably full statement of all the cases just above cited.

The second volume of Strange's Report being just now out of the Congressional Law Library, we take the following statement of Astley & Reynolds, from Buller's *Nisi Prius*, 132:

Str., 915. "Where the plaintiff having pawned plate to the defendant for £20, at the end of three years came to redeem it, and the defendant insisting to have £10 for interest; the plaintiff tendered £4, being more than legal interest, which the defendant refusing, and insisting on the £10, the plaintiff paid it and had his goods, and brought his action for the surplus beyond legal interest; and, on a case made, the court held that the action well lay, for that it was a payment by compulsion; the plaintiff might have such an immediate want of his goods that an action of trover would not do his business, and the rule *volenti non fit injuria* holds only when the party had his freedom of exercising his will."

Close *vs.* Phipps, 7 Mann & Gr., 585. (49 E. C. L.:)

"The solicitor of a mortgagee, with a power of sale, refuses to desist from selling unless the mortgagee will pay expenses with which he is not properly chargeable; *held* that money paid under such compulsion may be recovered back."

Page 586. "It was contended, on the part of the defendant, that the plaintiff could not recover the money, at least in the present form of action, as it had been paid with a full knowledge of all the facts, and, therefore, must be taken to have been paid voluntarily. The learned judge was of opinion that the plaintiff was entitled to recover, and directed a verdict to be entered for her, for the full amount, but reserved leave to the defendant to move to enter a non-suit, or to reduce the damages. A rule *nisi* having been obtained, Atcherly, Serjt., showed cause, but Talfourd, Serjt., who was to have supported the rule, admitted he could not do so after the decision in Parker *vs.* The Great Western Railway Co. (*infra*, 7 Granger, 49 E. C. L., 253.)"

Tindal, C. J.: "This, I think, is quite as strong a case as that referred to. The money was obtained by what the law would call *duress*, as the plaintiff was obliged either to pay it or to suffer her estate to be sold, and incur the expense of a bill in equity. Rule refused."

**Shaw *vs.* Woodcock, 7 Barn. & Cress., 14 E. C. L., page 14:**

"A payment made in order to obtain goods or property, to which a party is entitled, and of which he cannot otherwise obtain possession at the time, is a compulsory and not a voluntary payment, and may be recovered back."

This was an action for money had and received, brought by Woodcock, the plaintiff below, to recover from Shaw and others, the defendants below, the assignees of Howard & Gibbs, bankrupts, the sum of £715 5*s* 7*d* paid to them by the plaintiff below, in order to obtain possession of certain policies of insurance belonging to him, and upon which the assignees claimed a lien to that amount, and which they refused to deliver up until that sum was paid. The verdict of the jury had negatived, in effect, the right of the assignees to the money or to a lien.

Bayley, J.: "If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment made by compulsion, and may be recovered back. There is no authority of law to show that the two things mentioned in argument are required in order to make the payment compulsory. That being the general rule of law, it is quite clear that the sum paid to obtain possession of these policies, was not a voluntary payment, and that it may be recovered back, unless the assignees had a right to receive the money," etc.

Atlee *vs.* Backhouse, 3 Mees & W., 632:

This was an action against the defendant, the receiver of the excise, to recover back money paid, by way of compromise, to obtain the surrender of spirits seized by the commissioner of excise, with a view to proceedings for a condemnation. The trial took place before Lord Abinger, C. B., when it was contended (p. 636) for the defendant:

> "That the action could not be maintained; on two grounds: first, that the payment had been made voluntarily by the plaintiffs in the course of a *legal compromise;* and secondly, *that it had not been shown that it had not been paid over* by the defendant according to the direction of the statute; and the Lord Chief Baron, being of that opinion, directed a non-suit."

A rule *nisi* for a new trial was discharged, substantially upon the grounds of the direction of the non-suit. (As to payments by way of compromise being voluntary and not to be disturbed, see Ray *vs.* Bank of Kentucky, 3 B. Monroe, 510.)

The expressions of the judges in refusing the new trial clearly support the preceding cases cited by the Court of Claims.

Oates *vs.* Hudson, 6 Wels. H. and G., 346: The defendant was a solicitor, and had refused to give up to the plaintiff certain deeds to which he was entitled, unless the plaintiff should pay a certain sum. The defendant had received the deeds from a client, and upon receipt of the money which the plaintiff paid in order to get possession of the deeds, paid over the amount to his client, who had no lawful claim to it. A rule for a new trial was refused.

PARKE, B. "There ought to be no rule. If the money had been paid to Mrs. Hudson, or to the defendant for her, voluntarily, and in order to satisfy the funeral and other expenses, it could not have been recovered back; in fact, however, it was not so paid, but only for the purpose of getting possession of the deeds. In Atlee *vs.* Backhouse, 3

M. & W., 633, it is correctly laid down that, in order to avoid a contract by reason of duress, it must be duress of a man's person, not of his goods, but that where a sum of money is paid simply to obtain possession of goods which are wrongfully detained, that may be recovered back, for it is not a voluntary payment. Pratt *vs.* Wizard, 5 B. & Ad., E. C. L. R. (Vol. 27) is an authority to the same effect. Here the money was not paid to the defendant in his character of agent so as to prevent the plaintiff from having an action against him. Snowden *vs.* Davis, 1 Taunt., 359, decided that, in order to enable an agent to set up the defence that he had paid over the money, it is necessary that the money should have been paid to the agent expressly for the use of the person to whom he has so paid it over. There MANSFIELD, C. J., points out the distinction between such a case and where a person pays money under compulsion to redeem his goods, and not with intent that the money should be paid over to any one in particular. So that the present case does not fall within the rule as to an agent, but is a payment under a species of duress, and the person who received the money is bound to pay it back."

"Pollock, C. B.; Platt, B. and Martin, B. concurred. Rule refused."

Adams case, 1 C. Cls., 306: "This was a suit to recover the amount of internal revenue taxes illegally collected. The defence set up was "that no protest was proved to have been made at the time the money was paid to the collector; that it was, therefore, a voluntary payment, and could not be recovered back."

Held: "The payment of an illegal tax is not voluntary, though no protest be made, for the collector is bound to collect the tax, and a protest would be unavailing."

The Boston and Sandwich Glass Co. *vs.* City of Boston, 4 Metcalf, 181: This was an action brought in March, 1840, to recover sums paid during a number of years for personal and poll taxes, to which plaintiffs were not legally liable. All these taxes were paid without any sort of protest, except those for the last year, 1839. The statement of the facts states (pp. 182, 183) "The taxes of the years preceding 1839 were paid by the plaintiff without any objection at the time, the *plaintiffs and defendants supposing them to be rightly assessed,*" etc.

The money had been paid into the Treasury of the defendant, the city of Boston.

The decision of the Supreme Court was that:

"The plaintiffs are to have judgment for the amount of taxes paid by them within six years next before action brought."

Syllabus: "Payment of taxes to a collector who has a tax bill, and warrant in the form prescribed by law, is to be regarded as a compulsory payment; and if such taxes were assessed without authority, they may be recovered back in an action for money had and received, although the party made no protest before payment."

Dewey, J., p. 187, (after showing that the taxes were illegally assessed.) * * *

"The next inquiry is, whether the payment of these taxes by the plaintiffs was not so far a voluntary act as to absolve the defendants from all legal liability to refund the amount thus paid. The legal principle relied upon on this point is this: that if a party, with full knowledge of all the facts of the case, voluntarily pays money in satisfaction or discharge of a demand unjustly made on him, he cannot afterwards allege such payment to have been made by compulsion, and recover back the money, even though he should protest at the time of such payment that he was not legally bound to pay the same.

"The reason of the rule and its propriety are quite obvious, when applied to a case of payment upon a mere demand of money unaccompanied with any power or authority to enforce such demand, except by a suit at law.

"In such case, if the party would resist an unjust demand, he must do so at the threshold. The parties treat with each other on equal terms, and if litigation is intended by the party of whom the money is demanded, it should precede payment. If it were not so, the effect would be to leave the party who pays the money the privilege of selecting his own time and convenience for litigation, delaying it, as the case may be, until the evidence, which the other party would have relied upon to sustain his claim, may be lost by the lapse of time and the various casualties to which human affairs are exposed. The rule alluded to, when properly applied, is doubtless a salutary one, and is not to be departed from, but in cases resting upon a plain and obvious distinction from such as are ordinarily and familiarly known as embraced within it.

"But the rule has its exceptions, and cases are not unfrequent in which the party paying money upon an illegal demand, and knowing it to be such when making the payment has been allowed to recover back the money. If there be a controlling necessity in the case, arising from the peculiar circumstances under which the money is demanded, the rule does not apply. Thus, where money is extorted by duress of goods, assumpsit will lie for it, as was held in the early case of Astley *vs.* Reynolds, (2 Str. 916,) where the defendant had in pawn plate of the plaintiff which he refused to deliver without the payment of the money illegally claimed; and it was held a payment by compulsion. A payment of money illegally claimed by a collector as tonnage duty, or light money, and which the plaintiff paid to obtain a clearance of his vessel was allowed to be recovered back. (Ripley *vs.* Gelton, 9 Johns., 201.) So, where money was paid to liberate a raft of lumber detained in order to exact an illegal toll, it was held to be a compulsory payment. (Chase *vs.* Dwinal, 7 Greenl., 134.) And generally, where money is paid to obtain the possession of property which the party making the illegal demand has under his control, such payment will be considered as compulsory. (Shaw *vs.* Woodcock, 7 Barn. & Cres., 73; Morgan *vs.* Palmer, 2 Barn. & Cres., 729.) * * *

Page 190. "Such being the state of the case, the payments made to a collector of taxes may be considered compulsory, and made under such circumstances as will authorize the party paying the money to recover back the same, if the tax was illegally assessed. In addition to the sum thus paid, the party will be entitled to recover interest from the date of the writ, or time of demanding repayment in cases where there was no protest or denial of right at the time of paying such taxes; and when paid under such protest, or denial of liability to pay the same, the interest will be added from the time of paying the taxes. The plaintiffs are to have judgment for the amount of taxes paid by them within six years next before action brought."

Amesbury Woolen Company *vs.* Inhabitants of Amesbury, 17 Mass., 461:

Assumpsit to recover back certain sums paid by the plaintiffs, as state, county and town taxes in Amesbury.

The plaintiff's property was taken by distress for the taxes of the year 1818, for the costs of which distress the plaintiffs paid, in addition to their taxes $6.45; the taxes for the other years having been paid voluntarily.

By the court: * * * "The voluntary payment of a part of the taxes in this case does not affect the right of the plaintiffs to recover the amount of money paid by them upon an illegal assessment.

" Defendants defaulted."

Remember Preston *vs.* The City of Boston, 12 Pick., 7:

"If a person pay an illegal tax in order to prevent the issuing of a warrant of distress with which he is threatened, and which must issue, of course, unless the tax is paid, the payment is to be deemed compulsory, and not voluntary."

"If a person owning real estate, in a town in which he does not reside, is assessed by the assessors of such town, as well as for his poll and personal property, as for his real estate, his remedy against the illegal tax on his poll and personal property is not merely by appeal as for an over-taxation, but in case he is compelled to pay the same, he may recover back the money in an action of assumsit."

Page 9. "Shaw, C. J., delivered the opinion of the Court, (after stating the facts.) The several questions arising upon this statement, are:

1. " Whether the plaintiff was rightfully taxed for his poll and personal property in the city of Boston? If not,

2. " Whether his only remedy was by an appeal, as for an over-taxation?

3. " Supposing him not liable, whether the amount was

voluntarily paid, so that he must be considered as having submitted to the demand as to a claim of right on the part of the city, and is thereby precluded from reclaiming the sum paid; or whether it must be considered as paid under compulsion and duress, so that if he was not liable to pay it, he may now recover it back as so much money received by the defendants to his use?"

* * * "3. The only remaining question is whether this money was paid voluntarily or under duress. A party who has paid voluntarily under a claim of right shall not afterwards recover back the money, although he protested at the time against his liability. The reason of this is obvious. The party making the demand may know the means of proving it, which he may afterwards lose, and because another course would put it into the power of the party to choose his own time and opportunity for commencing a suit. (Brisbane *vs.* Dacres, 5 Taunt., 143.) But it is otherwise when a party is compelled, by duress of his person or goods, to pay money for which he is not liable. It is not voluntary, but compulsory, and he may rescue himself from such duress by payment of the money, and afterwards, on proof of the fact, recover it back. (Astley *vs.* Reynolds, 2 Str., 916.) What shall constitute such duress is often made a question. Threat of a distress for rent is not such duress, because the party may replevy the goods distrained and try the question of liability at law. (Knibbs *vs.* Hall, 1 Esp. Rep., 84.) Threat of legal process is not duress, for the party may plead and show proof that he is not liable. (Brown *vs.* McKinally, 1 Esp. Rep., 279.) But the warrant to a collector, under our statute for the assessment and collection of taxes, is in the nature of an execution, running against the person and property of the party upon which he has *no day in court, no opportunity to plead and offer proof, and have a judicial decision of the question of his liability.*"

Ripley *vs.* Gelston, 9 Johns., 201:

Assumpsit to recover back from a collector of customs the amount of tonnage or light duty illegally exacted, as a condition of granting a clearance, and against the objection of plaintiffs that the demand was illegal.

*Per Curiam*, p. 209:

* * * "The tonnage or light-money in question was, at any rate, wrongfully demanded of the plaintiffs as a condition of the clearance, and, that being established, they are entitled to recover it back in this action, without showing any notice to the defendant not to pay the money into the public treasury. The cases which exempt the agent from the suit, if he has in the meantime paid over the money to his principal, without notice do not apply. Here is no person but the defendant, against whom the suit could, in any event, be brought, and the money was paid by compulsion. It was extorted as a condition of granting the clearance, and not paid with the intent or purpose that the collector should pass it to the credit of the United States."

Clinton *vs.* Strong, 9 Johns, 370: This was an action to recover the amount of costs illegally exacted by the clerk of a United States district court, as a condition of giving an order for the delivery of property libeled and seized, but of which the seizure had been withdrawn.

Held: "That the payment of the costs was not a voluntary act, having been exacted by the officer, *colore officii*, as a condition of the re-delivery of the property; and that the costs having been illegally exacted might be recovered back by an action of *indebitatus assumpsit*, at *common law*."

Per Curiam, (p. 377:) " * * * The payment of the costs could not be considered a voluntary act. They were exacted by the officer, *colore officii*, as a condition of the re-delivery of the property. It would lead to the grossest abuse to hold a payment made under such circumstances, a voluntary payment precluding the party from contesting it afterwards."

Steele *vs.* Williams, 20 Eng. Law & Eq., 319: "This was an action for money had and received to recover back fees illegally exacted by the defendant as parish clerk, for liberty to search the register-book of burials and baptisms."

Per Platt, B. and Martin B.: "When money is paid under an illegal demand, *colore officii*, the payment can never be voluntary."

Martin, B., (324:) " * * * As to whether the payment was voluntary, that has, in truth, nothing to do with the case. It is the duty of a person to whom an act of Parliament gives fees to receive what is allowed, and nothing more. This is more like the case of money paid without consideration; to call it a vountary payment is an abuse of language," etc.

None of these cases cited by the Court of Claims have been overruled, doubted, &c.

It was indeed said by Spencer, J., in Hall *vs.* Shultz, 4 Johns., 245: "That the principle of Astley *vs.* Reynolds, 2 Str., 916, had been overruled by Lord Kenyon, in the case of Knibbs *vs.* Hall, 1 Esp., 84.
This was evidently a careless and incorrect assertion.
See Chase *vs.* Dwinal, 7 Maine, 134.

The judgment of Lord Kenyon, in Knibbs *vs.* Hall (in his opinion, in which case he does not mention Astley *vs.* Reynolds) was justified, on the principle thus laid down in Starkie on on Evidence, Vol. 2, p. 6: "The plaintiff cannot, however, substitute this form of action [assumpsit] for the more appropriate ones of trespass or replevin when they are the respective remedies provided by the law for the particular grievance. And, therefore, where the proprietor of cattle wrongfully distrained pays money in order to obtain the possession of them, he cannot recover it on an action for money had and received, but must proceed in replevin or trespass. (Cowp., 414.) So it is if a tenant, under threat of distress, pays more rent than is due," citing Knibbs *vs.* Hall, 1 Esp., 84.

This was also the principle of the decisions in Colwell *vs.* Peden, 3 Watts, 327, and Webster *vs.* Aldrich, 2 New Hampshire, 461.

The following is a statement of a case cited by defendants' counsel below. William R. Benson and another *vs.* Jotham B. Monroe, 7 Cushing, 125:

"A vessel arrived at Boston, in 1847, with alien passengers on board; after the passengers were landed, the master refused to pay the head money, of two dollars for each of one hundred and forty passengers, demanded by the superintendent of alien passengers, under the statute of 1837, c. 238, § 3, which had been decided by this court to be constitutional and valid; whereupon the overseers of the poor commenced a suit (under Rev. Stat., c. 46, § 28, and St. 1837, c. 238, § 86) against the owners of the vessel, to recover the penalty of two hundred dollars for each passenger, and attached the vessel in the sum of thirty thousand dollars. The owners thereupon paid the money demanded, and costs, under protest, and with notice that they intended to sue to recover it back. The statute of 1837, c. 238, § 3, was afterwards decided by the Supreme Court of the United States to be unconstitutional and void. It was held that the owners could not maintain an action to recover back the head money and costs so paid."

The defendant was the superintendent of alien passengers, for the city of Boston, and the money was paid to him as such. Upon the refusal to pay the head money, suit had been commenced by the overseers of the poor of Boston, to recover penalties to the amount of $30,000, and on this suit the ship was attached. Thereupon, the plaintiffs paid the defendant, in settlement of the suit, the sum of $398.25, which included $280 head money, $100 for landing the passengers, (they having been landed under an independent agreement between the parties, that the passengers should be landed and that plaintiffs should pay $100 as the expenses of the landing,) and the costs of the suit. The defendant, as the agent of the overseers, agreed as a condition to the payment, to have the attachment dissolved. At the time of the payment, the defendant was requested to sign a paper promising to repay the money in case it should appear upon suit to be brought within thirty days, that plaintiffs were not legally bound to pay it; but the defendant refused to sign the paper.

Metcalf, J. "The Court deem this a plain case. It is an established rule of law that if a party, with a full knowledge of the facts, voluntarily pays a demand unjustly made on him, and attempted to be enforced by legal proceedings, he cannot recover back the money, as paid by compulsion, unless there be fraud in the party enforcing the claim, and a knowledge that the claim is unjust. And the case is not altered by the fact that the party, so paying, protests that he is not answerable, and gives notice that he shall bring an action to recover the money back. He has an opportunity in the first instance, to contest the claim at law. He has, or may have, a day in court; he may plead and make proof that the claim on him is such as he is not bound to pay. This circumstance distinguished such a case from most of those which were cited for the plaintiffs. As was said by Gibbs, J., in Brisbane *vs.* Dacres, 5 Taunt., 152, the party has an option, whether to litigate the question, or submit to the demand and pay the money. See, also, Preston *vs.* City of Boston, 12 Pick., 13, 14; Rawson *vs.* Porter, 9 Greenl., 119—Judgment for defendant."

Defendant's counsel, himself, admitted in argument (p. 130) that "where money is paid to release goods, or save them from execution, or any other summary process, and there is no opportunity to plead and defend, it may be recovered back. But, he added: "In this case an opportunity to plead and defend was given by the suit which was brought by the overseers of the poor."

### RECENT AMERICAN AUTHORITIES.

United States Digest, *new series*, Vol. 5, 1874:

Page 516, § 20. "Money paid under demand by an officer holding legal process purporting to authorize arrest or seizure of property to enforce collection, may be recovered back without proof of a protest made against it; although no actual arrest or seizure was made. But if no protest was made interest on the amount cannot be recovered, except from the time of demand or suit brought. 1872—Atwell *vs.* Zeluff, 26 Mich., 118; 1873—McKee *vs.* Campbell, 27 Mich., 497."

Vol. 4, 1873, page 462, § 14:

"To make the payment of an illegal demand involuntary it must have been made to *release the person or property of the party from detention*, or to prevent a seizure of either by one having apparent authority to seize it without resorting to an action. 1871—Wabaunsee Co. [county] *vs.* Walker, 8 Kan., 431; 1873—Wolf *vs.* Marshall, 52 Mo., 167."

Vol. 3, 1872, page 449, § 12:

"Where taxes are paid on the demand of an officer having authority to collect them by distraint, there is sufficient duress of the property to make the payment involuntary. 1869—Hendy *vs.* Soule, Deady, 400."

Vol. 2, 1871, page 477, § 12:

"Where one has paid an illegal or erroneous tax under protest on the demand of county officers, and the board of supervisors has refused to refund, the taxpayer may commence an action therefor against the county, notwithstanding the fact that the tax collected has, with other moneys, been distributed to the State, school, and bridge fund. *So held* when no question was made as to whether it was not the duty of the party to appeal from the action of the board, instead of commencing an action against the county. 1870—Lauman *vs.* Des Moines County, 29 Iowa, 310."

Vol. 1, 1870, page 489, § 12:

"What is a 'voluntary' payment. The unwilling payment of an illegal tax to a collector to avoid the seizure and sale of property, is not a voluntary payment. 1869—Hubbard *vs.* Brainard, 35 Conn., 563."

With these citations this brief is

Respectfully submitted,

EDWARD JANIN,

*Of Counsel for Appellees.*

# APPENDIX.

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## COURT OF CLAIMS.

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### E. E. NORTON, ASSIGNEE OF DE BOW & CO.,

### *vs.*

### THE UNITED STATES.

(11 Court of Claims Rep., 676. Rec., in No. 522, pp. 6–9)

Nott, J., delivered the opinion of the court.

The counsel for the claimant insists that the facts in this case are substantially identical with those in the case of La Peyre, (8 C. Cls. R., p. 165,) and that the decision of this court must necessarily follow that of the Supreme Court in that case. The counsel for the defendants is understood to concede the substantial identity of the facts, but to insist that the legal ground upon which the defense is now placed was not taken by the defendant's counsel in the case of La Peyre, and probably escaped the attention of the Supreme Court when deciding that case.

The former case singularly divided two courts, and was ordered to be re-argued on the same point in each. That point involved a determination of the time when the Proclamation June 24, 1865, (13 Stat. L., p. 769,) took effect—a proclamation which terminated restrictions upon commercial intercourse in the insurrectionary districts, and virtually brought the non-intercourse act (12 Stat. L., p. 257) to an end. The immediate question before the two courts was whether a proclamation takes effect on the day of its date or on the day of its publication; but the ultimate question which concerned the case, and determined the decision was whether restrictions upon commercial intercourse had ceased at New Orleans on the 24th of June, 1865—the day when the transaction between the claimant and the Government was consummated. Upon this question, four judges of the Court of Claims, after re-argument, stood equally divided, and judgment *pro forma* for the purposes of an appeal was rendered against the claimant. In the Supreme Court also, after re-argument, five judges were for reversal and four for affirmance, and the judgment was accordingly reversed with instructions to enter a judgment in favor of the claimant.

For the better understanding of the significance of this judgment of reversal, we now advert to the law and facts upon which the former case went up.

The non-intercourse enjoined by the act 13 July, 1861, (12 Stat. L., p. 237;) was to continue only so long as hostilities existed, and was to end whenever the President, by proclamation, should declare that they had ended. Within the general rule of non-intercourse there was, nevertheless, allowed an exceptional restricted commercial intercourse which was regulated, so far as these cases were involved, by the act 2 July, 1864, (13 Stat. L., p. 375, § 8,) and the Treasury Regulations, 9th May, 1865. The effect of the existing statutes and regulations was that cotton could not be brought into New Orleans except upon the payment of a bonus for the right thus to trade, which bonus was one-fourth of the cotton or of its value. In some instances, as in La Peyre's case, the bonus was paid in kind, by the actual retention of one-fourth of the cotton; in others, as in the case now before us, the payment was made in cash. In either case the form of the transaction was by a sale and re-sale of the cotton. Thus the owner here sold the cotton to the Treasury agent at a nominal consideration of $9,625.98, and the Treasury agent immediately sold it back to the owner at a nominal consideration of $12,834.64, and the owner thereupon paid the difference, viz, $3,208.66, the sale and re-sale constituting in fact but one transaction. It is also to be noted that at the time of this transaction the cotton was in the possession or under the control of the agent, and that an owner or importer could obtain control and possession only by going through the form of this transaction and paying the bonus which the regulations imposed. On the other hand, it is also to be noted that the cotton thus sold and re-sold was thereby freed from the payment of "all fees" and internal revenue "taxes."

When the case of La Peyre came up for consideration, it is apparent that two primary questions were involved, both of which must have been determined before it could have become necessary for the Supreme Court to proceed to the determination of the vexed and doubtful question of the proclamation. First, if the regulations were illegal and imposed no valid restriction upon this commercial intercourse, it was manifestly needless to determine whether they were abrogated on the 24th of June by the proclamation. This court in Block's case (8 C. Cls. R., p. 461) expressed this opinion as to the action of the Supreme Court in La Peyre's case, and that Court has more recently held in McClelland's case (10 C. Cls. R., p. 68) that kindred regulations affecting this species of traffic were lawful and obligatory. The second of these primary questions was whether La Peyre had a case which could be sustained upon his own theory of the law—whether he could recover back the money paid into the Treasury if the restrictions upon commercial intercourse were, as he claimed, at an end. For, unless this primary question was likewise determined in favor of La Peyre, manifestly it was needless to order a re-argument upon what was only a resulting question—the time when the proclamation took effect—the time when restrictions upon commercial intercourse ceased.

It is true that a primary question of this character is sometimes overlooked by a court when it has not been discussed at the bar, but in view of the protracted consideration which the case of La Peyre received, and the unusual pains bestowed upon it by the Supreme Court, we do not feel warranted in ascribing any such oversight to the deliberations of that tribunal. Apart from the fact of a re-argument, there was also the important circumstance of a nearly equal divided court. Four of the nine judges thought that the claimant should not recover, but they rested their dissent exclusively upon the effect to be given to the proclamation. Upon all other points and questions the members of the court stood unanimous in his favor. The concurrence of the minority as to the primary rights of La Peyre is thus announced in the dissenting opinion of Mr. Justice Hunt:

"If it (the proclamation) had vitality or existence on the 24th day of June, the Government agent had no authority to retain the 119 bales of cotton by virtue of the law of 1864. If it had not existence on that day, he had authority, and the present claim is without fundation."

The counsel for the defendants places the defense of this case upon the general rule that a voluntary payment made in mutual mistake of law cannot be recovered back. As to the rule there can be no question; but whether the payment in this case was in legal effect voluntary is by no means free from doubt. The claimant's goods were in the possession of the Treasury agent; he, in the language of Mr. Justice Hunt, "had no authority to retain" them; yet he exacted a payment equal to one-fourth of their value as a condition to restoring them to the possession of the owner. In some cases it has been held that such a payment must be deemed to have been made under a moral duress, (Astley *vs.* Reynolds, Str. R., 915; Close *vs.* Phipps, 7 Mann. & Gr., 586; Shaw *vs.* Woodcock, 7 Barn. & Cress., 73; Atlee *vs.* Backhouse, 3 Mees. & Wels., 633; Oates *vs.* Hudson, 6 Wels., H. & G., 346;) in others it has been held that the payment of an illegal tax, or impost, or official charge, is not voluntary, though no protest be made. (Adams Case, 1 C. Cls., R., p. 306; Boston & Sandwich Glass Co. v. City of Boston, 4 Metcalfe, 181; Amesbury Woolen Co. v Inhabitants of Amesbury, 17 Mass., 461; Preston v. Boston, 12 Pick., 7; Ripley v. Gelston, 9 Johns., 201; Clinton v. Strong, id., 370; Steele v. Williams, 20 Eng. Law and Eq., 319.) In short, there is a current of authorities which hold (apart from some statutory requirement of protest at the time of payment) that a payment made to a public officer who has the power of compulsion behind him, or a payment exacted by an officer *colore officii* as a condition to the delivery of a man's property, is never to be considered a voluntary act. As was said by the court in one of these cases, (Clinton *vs.* Strong,) "It would lead to the grossest abuse to hold a payment made under such circumstances a voluntary payment, precluding a party from contesting it afterward." And, as was said by Baron Martin in another, (Steele *vs.* Williams:) "As to whether the payment was voluntary, that has in truth nothing to do with the case; * * * to call it a voluntary payment is an abuse of language. * * * Where a party says, 'I charge you such a sum by virtue of an act of Parliament,' it matters not whether the money is paid before or after the service was rendered; if he is not entitled to claim it the money may be recovered back."

Therefore, without passing upon the applicability of the doctrine of involuntary payments enacted *colore officii*, there is abundant reason for saying that the Supreme Court might well have decided as it did, and that if any judicial inadvertence existed it is for the Supreme Court, and not this, to correct the error.

It is also said by the counsel for the Government that the owners receiving their cotton freed from the payment of all "fees" and internal revenue "taxes" constituted a sufficient consideration to support the transaction. But such was the fact in the case of La Peyre, and it would seem that if the Supreme Court really held that the Treasury agent had no authority to exact anything from the owner, his illegal conduct could not be cured by his relinquishing a portion of the exaction, though put in the guise of a release from fees and internal revenue taxes. If the Government lost a tax by the transaction which it is entitled to receive, the modern English case of DeLancey *vs.* The Queen, (6 L. R. Exch., p. 206) is authority for saying that its right might have been asserted in this action by way of set-off.

A second cause of action is set up in the petition, viz, for the bonus exacted on other cotton brought in from the west bank of the Mississippi before the proclamation restoring commercal intercourse with territory on that side of the river had been issued. We think that demand is answered by the construction hereinbefore given to the decision of the Supreme Court in La Peyre's case, and by its decision in McClelland's (10 C. Cls. R., p. 68.)

The judgment of the court is that the claimant recover $3,208.66, exacted from him on the thirteenth of June, 1865, for cotton brought from the east bank of the Mississippi, and that his claim founded on cotton brought in on the same day from the west bank of the Mississippi be dismissed.

Richardson, J., was absent when the decision was announced, but had taken part in the consideration of the case and agreed in the conclusion of the court.

Under the decision just rendered in the case of Norton, assignee of DeBow & Co. *vs.* The United States, the following judgments were entered:

In the case of White & Montgomery *vs.* The United States, judgment in favor of the claimants for $3,443.50.

In the case of J. R. Bonnafon *vs.* The United States, judgment in favor of the claimant for $2,066.10.

In the case of Norton, assignee of B. P. Ethell, *vs.* The United States, judgment in favor of the claimant for $3,856.72.

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*Opinion of the Court of Claims upon the Question of Set-off, delivered in the case of Roman and Olivier, No. 528, (Rec., p. 4.) 11 Ct. Claims Rep.*, 761.

NOTT, J., delivered the opinion of the court:

This is an action brought to recover the value of 35 bales of cotton exacted by the Treasury agent in New Orleans, on the 13th June, 1865, pursuant to the act 2d July, 1864, (13 Stat. L., p. 375, § 8,) and the Treasury regulations thereunder, 9th May, 1865. The cotton, of which this was one-fourth, was brought from the east bank of the Mississippi, and the facts are almost identical with those in the recent case of De Bow's Assignee. Therefore, the claimants' right to recover must be deemed to have already been determined, and the only question which can be considered in this court arises from the set-off or counter-claim which the defendants have set up.

The counter-claim is for the internal-revenue tax of two cents per pound on the cotton. This the defendants allege they might have collected if the agreement of sale and resale with the Treasury agent had never existed. By the terms of the bill of sale given to the claimants by the Treasury agent on the 13th of June, 1865, 107 bales of cotton were returned to them "free from all fees and internal revenue taxes." If this bill of sale had never been given; if all the cotton had been handed over to the owners without the exaction of one-fourth, *non constat* but that the Government might have collected the internal revenue tax upon it. We perceive no reason why such counter-claim should not be set up. If the transaction was a mistake against the claimant as regards the exaction of one-fourth of the cotton, it was also a mistake as against the Government in giving up three-fourths free from all fees and internal revenue taxes. In the modern English case of Delancey *vs.* The Queen, (6 L. R. Exch. R., p. 286,) the Crown pleaded as a set-off a tax which, by mistake of the commissioners of inland revenue, had never been laid upon a legacy, and the court adjudged the case in favor of the Crown upon this set-off. The right given to the United States by the amended Court of Claims act (Rev. Stat., § 1091) to resort to a cross-action against the claimant, is certainly as comprehensive as the similar right given to the Crown by the petitions of right act of 1860, (23 and 24 Vict., c. 34,) and the English case is an authority in point.

But it by no means follows that the Government should recover taxes upon cotton which was withheld from the claimant, over which he exercised no rights of ownership, and from which he has hitherto derived no advantage whatever. The recovery in these actions has been limited to the actual avails of the cotton, *i. e.*, the price which it subsequently brought in the Government's hands. As a matter of fact this price was less than the value of the cotton when it was withheld from the owners by the Treasury agent in New Orleans. The claimants never enjoyed the right to use or dispose of the cotton so withheld, and as it was never in their unrestricted or legal possession there can be no propriety in the Government recovering taxes upon it, which they illegally withheld from the owner and have never [illegible] restored to him.

The judgment of the court is that the claimants recover of the defendants the value of the 35 bales of cotton withheld from them, to wit: the sum of $4,820.90, and that the defendants recover under their plea of set-offs the internal revenue tax on the 107 bales of cotton returned to the claimants, amounting to $848.94, and judgment will be entered for the claimants for the balance remaining, to wit: $3,971.96.

# Supreme Court of the United States.

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## *No. 522.*

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THE UNITED STATES

*vs.*

E. E. NORTON, Assignee in Bankruptcy
of B. DeBow & Co.

And Nos. 523, 524, 525, 526, 527, 528, and 529.

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APPEALS FROM THE COURT OF CLAIMS.

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## SUPPLEMENTAL BRIEF FOR APPELLEES IN ANSWER.

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As the first brief for appellees was written in advance of appellants', we beg leave to reply briefly to certain points of the latter.

The United States admit (p. 3) that Nos. 524, 525, and 526, are like the case of Lapeyre. But for inadvertence, the admission would have been extended to the *second* claim in No. 527, where the bonus was exacted June 27, and to the *second* claim in No. 529, where the bonus was exacted June 26. In those two cases, however, the counsel are right as far as it concerns the *first* claim in each.

The brief says, (p. 5): "The Treasury agent had no pos-" session nor control of it [our cotton] until the owners of "their own motion, upon the 13th of June, 1865, gave him "a bill of sale of it, and he immediately re-billed three "quarters of it to them."

This statement is a total error. The records in all eight of these cases contain a finding of fact that all the cotton had to be "Consigned" to the agent. It was not allowed to be shipped except under such consignment. Consequently, when it reached New Orleans, it could not be in the possession or under control of the owners. As claimants did not know of the proclamations, they paid the Government 25 per cent. without question. As the agent did not know of them, he would not have restored any of the cotton without the payment. The compulsion consisted in the agent's possession, coupled with his claim of right and actual power to retain possession until payment. The fact of compulsion is not a part of our cause of action. It is merely a fact proved in order to repel and rebut the inference of voluntariness which the law might or would draw from the presumption that we knew the law did not require the payment, and the fact that we nevertheless did pay.

This disposes of the first seven pages of appellees' brief.

On pages 8 and 9, and 14 and 15, counsel insist: "There "was no *express* contract to take certain cotton, make sale "of it for the owners, and return them the proceeds," and that no such contracts can be implied, that if there is any implied contract, it is based upon an alleged tort of the Treasury agent which we cannot waive so as to maintain an action upon implied contract against the United States in the Court of Claims, because by waiving the tort we waive the whole cause of action, and moreover, if we could waive the tort, would thereby give jurisdiction in assumpsit to a court which would not have jurisdiction of the tort.

The last suggestion seems to us to come from some mysterious principle of the common law, which we do not believe can concern the jurisdiction, *sui generis* in this country, of the Court of Claims, which is fixed by express statute and not by the common law, and is not contracted by common-law doctrines as to forms of action.

We therefore pass over this suggestion.

But we admit that there was no contract, express or implied, that the Government should, through the agent, become our cotton factor, take our cotton and sell it, and return us the proceeds. We admit that if the Treasury agent had embezzled our money or the proceeds of our cotton, we could not have recovered against the United States. That would have been a "tort" of an official, for which the Government is not liable. We are not suing upon any "tort" at all—not even upon the "tort" of taking our money, or our cotton illegally. If we were, and if such actions could be maintained, we might, perhaps have recovered the value of our cotton at the highest price since the taking; or, at the very least, the value of our cotton at the time of the unlawful taking. But the judgments do not even give us so much as the value of our cotton at the time it was taken. See the opinion in No. 528, Roman and Olivier's case, where it is said:

> "The recovery in these actions has been limited to the actual avails of the cotton, *i. e.*, the price which it subsequently brought in the Government's hands. *As a matter of fact this price was less than the value of the cotton when it was withheld from the owners by the Treasury agent in New Orleans.*"

Our judgments are for nothing more than the actual receipts by the United States, from cash paid by us, or from the net proceeds of our cotton, sold by the United States. This is all we demanded and all we got. We have sued upon implied contracts resulting from the fact that the United States have in their Treasury moneys which *ex æquo et bono* they ought to refund to us. The gist of our causes of action is that the Government, has in its Treasury, moneys which it ought in fairness and right to pay back to us. That there may have been a technical (though not moral) "tort" some-where and by somebody in the chain of events which led to the receipt of the money by the United States, is of no consequence. We are not suing for damages for a "tort," but for the refunding, without interest, of our money which is now, and has been for a dozen years, in the Treasury of the United States. The wrong of which we complain, consists in not having repaid us this money. This wrong would be the same (the money being due to us) in whatever way the Government might have got the money. Nonpayment of money due is a wrong, but it is not a "tort," in the sense of this Court in Gibbons *vs.* The United States, 8 Wall., 275. Counsel for appellees seem, however, to suppose it to be so, since they say, at the latter part of their brief:

> "The limitation of the Court of Claims to the considera- of contracts was based upon the theory that the State could do no wrong."

Our theory of our actions is that these are actions upon implied contract to refund moneys in the possession of the Government which it ought in justice to refund, the implication of contract resulting from the moral obligation to repay the money. As was said by Justice Story, in Allen *vs.* McKeen, 1 Sumner's Rep., 317:

> "It is a very clearly established principle of law, that if one man receive money, *which ought to be paid to another*, or belongs to him, this action for money had and received will lie in favor of the party to whom of right the money belongs. So it is laid down by Lord Chief Justice Willes, in Scott *vs.* Surnam, (Willes R., 400,) and the doctrine has ever since been adhered to."

And in Cary *vs.* Curtis, Judge Story said, in his *dissenting* opinion, 3 Howard, 254:

> "Now, how stands the common law on this very subject? It is, that an action for money had and received lies in all cases to recover back money which a person pays to another

in order to obtain possession of his goods from the latter, who withholds them from him upon an illegal demand or claim, *colore officii*, and thus wrongfully receives and withholds the money. Such a payment is in no just sense treated in law as a voluntary payment, but it is treated as a payment made by compulsion, and extorted by the necessities of the party who pays it. Such is the doctrine of the common law as held in England, with a firm and steady hand, against all the claims of prerogative, and it is maintained in our day as the undeniable right of every Englishman against the unjust and illegal exactions of officers of the crown."

This case of Cary *vs.* Curtis, decided according to the Reporter's syllabus, (3 How., 236,) as follows:

"Since the passage of the act of Congress of March 3, 1839, chap. 82, sec. 2, which requires collectors of the customs to place to the credit of the Treasurer of the United States all moneys which they receive for unascertained duties, *or for duties paid under protest*, an action for money had and received, will not lie against the collector for the return of such duties so received by him. In what other modes the claimant can have access to the courts of justice, this court is not called upon in this case to decide."

The Supreme Court had previously decided, in Elliott *vs.* Swartwout, 10 Peters, 137, that if a collector had paid over duties collected, there could be no recovery against him, *unless* the payment was made under protest.

Thus, under Elliott *vs.* Swartwout, and the decision of the majority in Cary *vs.* Curtis, the citizen was debarred all judicial protection against the exaction of excessive duties, and left to the mercy of the Secretary of the Treasury.

This state of things it was that roused the indignation of Judge Story, and it is to a still worse condition that the arguments of the counsel for appellants attempt to reduce us. If we could not maintain an action in the Court of Claims, what remedy had we? We had no appeal to any executive officer, for what was exacted from us was neither customs duties nor internal revenue duties. We could not sue the agent, Cutler, for as we gave him no notice not to pay over the money or not to send the cotton to New York, he was protected, not only by the decision in Elliott *vs.* Swartwout, but by the plainest principles of decency and fairness. Counsel for appellants suggest that we should apply to Congress. As to this suggestion, we may address to this Court the question of Erskine to Lord Kenyon, who had suggested he should take his case into chancery: "Would your Lordship send a *dog* you loved there?"

Applications to Congress are precisely what the Court of Claims was established to prevent. Such applications seldom result in anything except inaction by Congress and monomania to the applicant condemned, "in suing long to bide."

The opinion of the majority in the case of Cary *vs.* Curtis, was delivered by Justice Daniels, who says, (3 How., 246, 247:)

> "The action of assumpsit for money had and recovered, it is said by Lord Mansfield, Burr., 1012, Moses *vs.* Macferlen, will lie in general whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged, by the ties of natural justice and equity, to refund."

In that case of Moses *vs.* Macferlen, Burr., 1005, Lord Mansfield said at the close of the opinion:

> "This kind of equitable action to recover back money which ought not in justice to be kept, is very beneficial and therefore much encouraged. It lies only for money which, *ex æquo et bono*, the defendants ought to refund. * * * But it lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition, (express or implied,) or extortion, or oppression, or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. *In one word the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.*"

These last words of Lord Mansfield express the theory of our actions. The United States are under an implied contract to refund to us, because they ought in justice to do so. And there is no statute or fixed rule of law, or lack of jurisdiction, to obstruct the rendition of judgment that they shall do so. Put into plain language, the position of the United States is that of a party who, having had a right to a payment, has released it by a deed from which he cannot retreat, but, through his agent's ignorance of the release, has received the payment and persists in retaining it.

On pages 8 to 14 of their brief, counsel for the United States devote themselves to the point that (p. 9) "*non con-*" *stat*, but that the law was in force at the moment these " sums were paid, which the agent received June 13, 1865, and which are reclaimed in Nos. 522, 523, 527,* 528, and 529.*

Our answer to this point is that the proclamation of June 13th, 1865, took effect, by presumption of law, at the earliest moment of that day; that this presumption could be removed only by evidence, and that the United States did not choose to introduce evidence before the Court of Claims as to the *punctum temporis* when the proclamation of June 13th, 1865, was signed.

Suppose the execution of the bills of sale took place at the very moment when the exactions became illegal; nevertheless the exactions were as unjustifiable as if their illegality had been established the day before or two or a dozen days before.

It is quite enough for our purposes that the exactions and the illegality thereof were contemporaneous.

It stands to reason, that the party to whom the "*punctium temporis*" is important, should prove the "*punctum*" by evidence. The United States did not do this. There is no evidence at all in the records as to when the Proclamation of June 13th was signed.

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* Here again the counsel have failed to observe that the *second* claims in each of the two cases, Nos. 527 and 529, are for cotton exacted June 27th and June 26.

The presumption, in the absence of evidence is, that it was signed on the day of its date, and consequently took effect on the earliest moment of that day. That is a presumption of law which can be removed only by evidence, and there is no evidence in the matter. It is a presumption of law, or rather a *rule* of law, that the proclamation of June 13, 1865, took effect at the earliest moment of that day. But there is no presumption of law, still less of fact, that bills of sale were executed before daylight at least, of that day, June 13, 1865. The most that can be reasonably said against claimant's side of the question is that the exactions and their illegality were contemporaneous, and that is quite enough to show that the exactions were illegal.

We conclude by calling attention to page 9 of appellant's brief, where they say that from the moment of the signature of the proclamation, Cutler's "*Agency was revoked.*" No doubt that is so.

Respectfully submitted,

EDWARD JANIN,
*Of Counsel for Appellees.*